93-338

No. _____

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In The

# Supreme Court of the United States

October Term, 1993

LAKE FOREST DEVELOPMENTS,

*Petitioner,*

v.

FIRST GIBRALTAR BANK, FSB,

*Respondent.*

## Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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88 pp

## QUESTION PRESENTED

Does the common law estoppel rule established in *D'Oench, Duhme & Co., Inc. v. FDIC* apply to a case in which the claims or defenses are based on the breach of a written loan agreement?

## LIST OF PARTIES

Petitioner: Lake Forest Developments

Respondent: First Gibraltar Bank, FSB[1]

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[1] The Federal Savings and Loan Insurance Corporation was involved from the date of removal until August 9, 1989, the effective date of FIRREA. Thereafter, the Federal Deposit Insurance Corporation as Manager of Federal Savings and Loan Insurance Corporation Resolution Fund, as Receiver for Gibraltar Savings Association became involved as a party to the suit until Order for Summary Judgment was entered on March 26, 1991, reproduced as Appendix D, p. App. 17, infra. No appeal was taken from this Order.

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FIRST GIBRALTAR BANK, FSB,

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Lake Forest Developments, a joint venture ("Lake Forest"), respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on April 28, 1993.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not yet been reported, but is reproduced as Appendix A, p. App. 1, infra.

## JURISDICTION

The opinion of the Court of Appeals was delivered on April 28, 1993. See Appendix A, p. App. 1, infra. The judgment of the Court of Appeals was also entered on April 28, 1993. See Appendix B, p. App. 13, infra. The Order of the Court of Appeals denying Lake Forest's request for rehearing was entered on June 1, 1993. See Appendix F, p. App. 20, infra. The jurisdiction of the Court to review the judgment of the Fifth Circuit Court of Appeals is invoked under 28 U.S.C. §1254(1).

## STATEMENT OF CASE

### A. Basis of District Court Jurisdiction

In August 1981, Lake Forest filed suit in the 17th Judicial District Court of Tarrant County, Texas, against Gibraltar Savings Association ("GSA") for wrongful foreclosure of a deed of trust covering real property in Denton County, Texas, and for damages. This suit was based

on the breach of a written loan agreement dated March 30, 1977 between GSA as Lender and Lake Forest as assignee of the loan agreement.

On December 27, 1988, the Federal Home Loan Bank Board appointed the FSLIC as receiver of GSA. Subsequently, the FSLIC entered into a Purchase and Assumption Agreement with First Gibraltar Bank, FSB ("First Gibraltar").

On or about January 25, 1989, the FSLIC as receiver intervened in the state court action and filed a verified petition for removal pursuant to 12 U.S.C. §1730(k)(1) and 28 U.S.C. §1441, which removed the action to the United States District Court for the Northern District of Texas, Fort Worth Division.

**B. Statement of Background Facts**

Prior to 1977, GSA was advancing development funds to and had a profit participation in an entity known as Trophy Club Joint Venture ("Trophy Club") which was a joint venture composed of Johnson-Loggins, Inc. ("Johnson-Loggins"), Ben Hogan ("Hogan"), and John McMackin ("McMackin").

In March of 1977, at the insistence of GSA, Trophy Club was dissolved with Johnson-Loggins' withdrawal. GSA assumed management of the property with the exception of 75 acres. This tract of 75 acres was the basis of a new loan agreement between GSA and Johnson-

Loggins dated March 30, 1977. See Appendix G, p. App. 22, infra. On the same day, i.e., March 30, 1977, Johnson-Loggins deeded the 75 acres to Hogan and McMackin and assigned the loan agreement to them with the express agreement of GSA. See Appendix H, p. App. 33, infra.

This assignment included all of the rights and obligations, including those described in the promissory note in the principal amount of $1,800,000.00, which was executed pursuant to Section 2.02 of the loan agreement. See Appendix I, p. App. 35, infra.

On September 14, 1977, Hogan conveyed his interest in the 75 acres to McMackin. See Appendix J, p. App. 39, infra, and on the same day, McMackin conveyed the 75 acres to Lake Forest. See Appendix K, p. App. 41, infra. This transaction was approved in writing by GSA on November 7, 1977. See Appendix L, p. App. 44, infra.

The development proceeded on schedule through the balance of 1977 and into late 1978. In the Fall of 1978, the furnishing of new funds in the form of a renewal, extension, and an additional loan as contemplated by the loan agreement for the development of new phases of the property was discussed by representatives of Lake Forest with Charles Ackerman ("Ackerman"), Vice President of GSA and Wiley Wisely ("Wisely"), who was President of GSA. Lake Forest was informed in the early Fall of 1978, that it would have to provide appraisals to support an increased overall loan amount. This was the first time the subject had come up because there had been no appraisal in connection with the March 30, 1977 loan in the amount of $1,800,000.00. It was during these discussions that the meaning of the provision in Section 2.02 of the loan

agreement which refers to reappraisals came up. Both Wisely and Ackerman told Lake Forest's representatives that the provision applied to reappraisals for phases which had already been appraised and approved for funding, but did not apply to *new* appraisals for the funding of development of *new* phases.

The negotiations for renewal, extension and additional funds were completed in January of 1979, and reduced to writing in a memorandum from Ackerman to Leroy Land dated January 11, 1979. See Appendix M, p. App. 45, infra. It should be noted that the memorandum refers to "reappraisal" in paragraph one, but as "appraisal" in all other references. In any event, the two appraisals referred to therein, one of which was dated November 13, 1978 and the other November 20, 1978, respectively, were original appraisals because no appraisal had been furnished in connection with the March 1977 $1,800,000.00 loan. As a result of the January 11, 1979 memorandum, the loan request for $2,412,240.00 was approved and a new *non-recourse* note in the amount of $2,960,000.00 was executed on May 29, 1979. See Appendix N, p. App. 49, infra. The difference between the $2,412,240.00 referred to in the January 11, 1979 memorandum and the May 29, 1979 note represented additional monies to be advanced which had accumulated between January and the end of May 1979.

The development of the property again continued in an orderly manner through 1979 and into the Fall of 1980. In the Fall of 1980, two new loans were negotiated. The first loan was a collateral loan covering outstanding purchase money notes in the amount of $546,000.00 and the second loan was a follow on development loan to pay-off

the 1979 loan and to provide funds for the development of additional phases or sections. The loan requests were supported by two *new* appraisals dated October 7, 1980 and October 22, 1980. All of these negotiations were reduced to writing in a memorandum from Ackerman to Leroy Land dated November 14, 1980. See Appendix O, p. App. 54, infra.

In the summary and recommendations portion of the memorandum, Mr. Ackerman notes:

> "Based on the performance of the developer to date, and the high sensitive nature of this property as it affects the future development of Trophy Club, I recommend this loan be made."

Obviously, at this point in time, there was no problem with Lake Forest's performance.

No action was taken on these loan requests from the middle of November 1979 until only February 1980. However, during that period of time, Wisely had been fired as President of GSA.

At a meeting on February 5, 1980, Ackerman informed McMackin that GSA would refuse to fund under the terms of the existing March 30, 1977 loan agreement and, in addition, would make no further development advances unless:

1. The existing loan agreement was terminated by written termination instrument;

2. GSA would have no future obligation to furnish further development funding in contravention of Section 2.02; and

3. McMackin would execute a 100% personal guaranty of the loan in contravention of Section 5.01 of the loan agreement, the provisions of the promissory note, and the provisions of the Deed of Trust.

All of these discussions were included in a written memorandum from Ackerman to E. Michael Lallinger, Chairman of the Board of GSA dated February 9, 1981. See Appendix P, p. App. 58, infra. The next day, i.e., on February 10, 1981, the Senior Loan Committee approved the loan request subject to the changes contained in the February 9th memo. See Appendix Q, p. App. 60, infra. It should be noted that item 3 of the written Committee action states "Releases: 100% of net sales receipts or 110% of *appraisal*, whichever is greater." [Emphasis added] and that item 5. states: "Loan amount on collateral notes not to exceed loan balance or 80% of *appraisal*." [Emphasis added]. At the time of this action by the Committee, which was reduced to writing, the appraisals of October 7, 1980, and October 22, 1980, had been accepted. This fact is of critical importance because it establishes that the loan negotiations did not fail because of the exercise of any right of GSA to refuse to accept new appraisals or reappraisals.

It is undisputed that all of the documents referred to in this section of the Petition for Writ and contained in the appendices were kept in the loan file of Lake Forest in the official records of GSA and remained there during the receivership of the FSLIC and were subsequently delivered to First Gibraltar.

## C. Proceedings in the Courts Below

1. **State Court Proceedings.** As previously stated the action was originally brought by Lake Forest against GSA in the 17th District Court of Tarrant County, Texas. It was removed to the United States District Court by the FSLIC pursuant to 12 U.S.C. §1730(k)(1) and 28 U.S.C. §1441.

2. **District Court Proceedings.** After discovery had been conducted by all parties, Defendants First Gibraltar and the FDIC moved for summary judgment. Plaintiff, Lake Forest opposed Defendants' motions and also moved for summary judgment. By Orders entered March 26, 1991, the District Court granted First Gibraltar's and FDIC's Motions for summary judgment. See Appendix C, p. App. 15, infra and Appendix D, p. App. 17, infra. Judgment was entered by the District Court on March 26, 1991. See Appendix E, p. App. 19, infra.

3. **Fifth Circuit Proceedings.** In its appeal, Lake Forest contended that neither the common law estoppel doctrine established by this Court in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942) nor the provisions of 12 U.S.C. §1823(e) barred the claims of Lake Forest which were based on the breach of provisions of a written loan agreement which agreement was contained in the official Lake Forest loan file of GSA and subsequently those of First Gibraltar. Lake Forest further argued that the loan agreement imposed bilateral obligations which prevented the application of *D'Oench, Duhme*, and that the

> FSLIC as replaced by the FDIC and First Gibraltar took the property subject to the lis pendens filing in Denton County, Texas.

Since no appeal had been taken from the summary judgment in favor of the FDIC, First Gibraltar was the only appellee. On appeal, First Gibraltar contended that the *D'Oench, Duhme* doctrine and 12 U.S.C. §1823(e) precluded Lake Forest's claim of wrongful foreclosure based on the breach of the written loan agreement because: (1) the notes and deeds of trust were self-contained documents which did not refer to the loan agreement and therefore the provisions of the loan agreement imposing bilateral obligations could not be considered by the Court, (2) since Lake Forest was not a signatory party to the loan agreement, it could not claim any rights under it, and (3) Lake Forest's claims were barred by the federal common law holder in due course doctrine.

The case was set for oral argument and was argued in March of 1992 before a panel consisting of Circuit Judgment Garwood, Emilio M. Garza, and John R. Brown. Subsequent to oral argument, but before the opinion came down, Judge Brown passed away. The opinion was handed down on April 28, 1993, approximately 13 months after the oral argument.

Between the dates of the filing of Lake Forest's and First Gibraltar's briefs in August and September, 1991, and the Court's decision on April 28, 1993, certain rules of law applicable to this case had become well settled. Under the holding of the Court in *Sunbelt Savings, FSB, Dallas, Texas v. Montross*, 923 F.2d 353, *rehearing granted and panel opinion reinstated in part*, 944 F.2d 227 (5th Cir.

1991) it is clear that a successor holder of a non-negotiable note such as the one in this case where there was no personal liability as well as other non-negotiable elements could not avail itself of holder in due course protection.

Further, First Gibraltar's contention that the Court should look only to the notes and deeds of trust and not to other loan documents contained in the loan file was clearly repudiated by the Fifth Circuit in the case of *Resolution Trust v. Oaks Apartments Joint Venture*, 966 F.2d 995 (5th Cir. 1992).

However, rather than applying the holdings in these decisions to the case at bar, the Court based its decision on grounds which had never been put forth by First Gibraltar, either in motion for summary judgment or in any brief filed with the Court on appeal. The point which was raised for the first time by counsel for First Gibraltar in oral argument and upon which the Court subsequently relied for the basis of its opinion were certain allegations contained in Lake Forest's fourth amended petition which was filed long before discovery was completed. Based upon this pleading and solely upon it and no other summary judgment evidence, the Court affirmed the summary judgment of the District Court.

## REASONS FOR GRANTING WRIT

### I. THE FIFTH CIRCUIT SUBSTANTIALLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THAT ITS DECISION CONFLICTS WITH PRIOR HOLDINGS OF THE FIFTH CIRCUIT.

In basing its decision in this case solely on a portion of one of Lake Forest's pleadings, the Court has relied upon an allegation which subsequent discovery made irrelevant to Lake Forest's right to recover for a direct breach of loan agreement not dependent upon *any* oral arguments with regard to appraisals or reappraisals. The Court ignores the fact that in this case, there exists certain claims and defenses which we barred by *D'Oench, Duhme,* and others which are not. In refusing to recognize the distinction between the claims of Lake Forest, the Court has fallen into error and into conflict with other decisions of the Court.

As compelling evidence that the Court has confused an alleged oral agreement to accept appraisals or reappraisals with a separate direct breach of the written loan agreement can be demonstrated by this statement in the slip opinion on page 3790:

> "Judged according to the terms of the written agreement, GSA's complained of refusal to advance further funds to Lake Forest in 1981 based on a reappraisal of the property at that time (or, more precisely, its refusal to advance further funds without changing the terms of the loan agreement to require a personal guaranty) cannot be a breach of the agreement." [footnote omitted].

The fatal flaw in this statement by the Court is that it assumes that the right of GSA under the provisions of the loan agreement to refuse to accept a reappraisal and the right to demand a personal guaranty are one and the same thing.

These two entirely separate and distinct concepts, i.e., (1) the right to refuse to accept a reappraisal, and (2) the demand for a personal guaranty are not even governed by the same section of the loan agreement.

The right of GSA to refuse to accept a reappraisal is contained in §2.02 of the loan agreement which is also the section which required GSA to fund. §2.02 provides that GSA was:

> " . . . obligated to furnish to [Lake Forest] the amount of funds required to discharge and pay the costs of acquisitions and holding of said property."

This obligation to fund under the loan agreement was limited only as follows:

> "Notwithstanding anything contained herein to the contrary, Gibraltar shall not. . . . accept a reappraisal at a later date in order to increase the amount of funds to be advanced hereunder." See Appendix G, p. App. 22, infra.

On the other hand, the right of GSA to demand a personal guaranty is governed by §5.01 of the loan agreement which states:

> "*LIABILITY*. The monetary obligation of Owner shall be *non-recourse with Owner assuming no liability for repayment*. Gibraltar agrees to look

> exclusively to the security for repayment of such monetary obligations." [Emphasis added]. See Appendix G, p. App. 22, infra.

The analysis and conclusion by the Court that the concepts were the same thing was just wrong. To refuse to fund because of a concurrent refusal to accept a reappraisal under §2.02 was a right that GSA clearly had under the loan agreement. To refuse to fund without a personal guaranty was a breach under §5.01 which provided that the loans would be non-recourse.

In fact, footnote 1 which appears on page 3790 is also in error. The footnote states:

> "There is no claim (or evidence) of any written waiver or agreement to accept such a reappraisal."

To the contrary, Lake Forest would submit that there is a great deal of written evidence of either waiver or agreement depending upon how one prefers to classify it. The memorandum of January 11, 1979, from Ackerman to Leroy Land which refers both to "reappraisal" and "appraisal" and upon which a new loan was approved was either an agreement or a waiver of the right to refuse contained in §2.02. It certainly is in writing. See Appendix M, p. App. 45, infra. To the same effect is the memorandum dated November 14, 1980, from Ackerman to Leroy Land. See Appendix O, p. App. 54, infra; and the memorandum dated February 9, 1981 from Ackerman to E. Michael Lallinger. See Appendix P, p. App. 58, infra; and indeed the written action of the Senior Loan Committee on February 10, 1981. See Appendix Q, p. App. 60, infra.

The truth is that this case has never been about appraisals or reappraisals. They were always required by GSA. They were always accepted by GSA without question. What the case is about is two separate breaches of the loan agreement, i.e., (1) refusal to fund unless Lake Forest agreed to a termination of the agreement in contravention of §2.02, and (2) refusal to fund unless McMackin executed a 100% personal guaranty in contravention of §5.01 of the agreement.

The Fifth Circuit has continually insisted on treating this case as if the only claim or defense that Lake Forest had depended upon an oral waiver of the right to refuse to accept reappraisals and thereby brought it within the doctrine of *D'Oench, Duhme*. That would be correct if the facts showed that (1) Lake Forest had submitted an appraisal or reappraisal in order to obtain a new loan; (2) GSA had refused to accept the appraisal or reappraisal; and (3) the only ground that Lake Forest was advancing as its claim or defense was that GSA through Wisely and Ackerman had orally agreed that GSA would accept reappraisals. After discovery when it became clear that evidence of the breaches of the loan agreement had been reduced to writing and were contained in the records of GSA, the allegations of oral waiver became irrelevant and were not pursued by Lake Forest. Further, neither the allegations nor any proof of them was offered by Lake Forest, First Gibraltar, or the FDIC in the motions for summary judgment or in any brief on appeal.

The error of the Court in arriving at its decision is clearly demonstrated by the cases which are cited in the opinion to support the Court's conclusion that the estoppel doctrine of *D'Oench, Duhme* applied. In every case,

but one, the sole basis for the claim or defense depended on an oral agreement. In *Federal Deposit Insurance Corp. v. Hamilton*, 939 F.2d 1225, 1229 (oral agreement to fund line of credit within one day of loan request); *Federal Savings & Loan Insurance Corp. v. Griffin*, 935 F.2d 691, 697 (5th Cir. 1991), cert. denied, 112 S.Ct. 1163 (1992) (oral agreement to fund where written agreement provided only option on part of lender); *Porras v. Petroplex Savings Association*, 903 F.2d 380-381 (5th Cir. 1990) (oral agreement to loan additional $3 million); *Bowen v. Federal Deposit Insurance Corp.*, 915 F.2d 1013, 1016 (bank officer's oral promise to extend a loan); *Texas Refrigeration Supply, Inc. v. Federal Deposit Insurance Corporation*, 953 F.2d 975, 982 n. 13, 983 & n. 15 (5th Cir. 1992) (oral agreement not to accelerate maturity of loan). The only other case cited by the court was *Buchanan v. Federal Savings and Loan Insurance Corp.*, 935 F.2d 83, 86-7 n. 5 (5th Cir.) cert. denied sub nom. *Buchanan v. First Gibraltar, FSB*, 112 S.Ct. 639 (1991). This was a lis pendens case and not pertinent to Lake Forest's argument here.

For the above reasons, the Court committed error and rendered a decision that is clearly in conflict with the decisions of the Fifth Circuit which should control this case.

The Fifth Circuit case which is probably the closest on its facts to the instant is *Federal Savings & Loan Insurance Corporation v. Mackie*, 962 F.2d 1144 (5th Cir. 1992). In this case, *Mackie* made two separate types of claims or defenses against the lender. The first claim was that the lender had agreed to extend the time of the commitment for a permanent loan and then did not. This alleged agreement was oral. The second types of claims or

defenses were grounded in allegations that the lender had breached the permanent loan commitment agreement which was in writing. In reversing summary judgment granted by the District Court in favor of the lender the Court held as follows:

> "Mackie's other defenses, however, are not necessarily barred by *D'Oench Duhme* and were not directly discussed in *Locke*. Mackie alleges that Lamar breached the permanent loan commitment agreement and in doing so breached its duty to deal in good faith. Mackie also alleges that Lamar's failure to close the permanent loan and its posting the property for foreclosure constituted an unconscionable course of action in violation of the Texas Deceptive Trade Practices Act (TDTPA). In *Locke*, the court held that Locke's claims based on breach of fiduciary duty, bad faith and violation of the TDTPA were barred by the *D'Oench, Duhme* doctrine because all of these defenses were based on oral representations and promises made by the bank to Locke. *Locke*, 718 F.Supp. at 582. That is not the case here. We agree that Mackie cannot assert any defenses based on the alleged oral agreement that Lamar would transfer funds allocated to other items of the construction budget to the interest reserve. He can, however, assert defenses that are based on obligations contained in the written Loan Agreement, as long as he does not rely on any unrecorded agreements to support his allegations. *FDIC v. Laguarta*, 939 F.2d 1231, 1239 (5th Cir. 1991). Therefore, we remand Mackie's claims that Lamar breached the loan agreement, breached its duty of good

> faith, and violated the TDTPA to the district court."
> 962 F.2d at 1150-1151.

Other Fifth Circuit decisions which agree with the holding in *Mackie* and conflict with the holding in the instant case are *Resolution Trust v. Oaks Apartments Joint Venture*, supra, p. 1,000; *Hamman v. Southwest Gas Pipeline Company, Inc.*, 84 F.2d 299, 304 (5th Cir. 1987) *vacated in part on rehearing*, 832 F.2d 55.

## II. THE FIFTH CIRCUIT SUBSTANTIALLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THAT ITS DECISION CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

The Courts of Appeals in other circuits have held that where a written agreement such as a loan agreement or a lease agreement impose bilateral obligations *D'Oench, Duhme*, may not be interposed to bar claims or defenses. In delineating the applicable rule the Court in *Howell v. Continental Credit Corporation*, 655 F.2d 743 (7th Cir. 1981) stated:

> "We believe these holdings are inapplicable, therefore, where the document the FDIC seeks to enforce is one, such as the lease is here, which facially manifests *bilateral* obligations and serves as the basis of the lessee's defense. In these situations, we do not believe the lessee should be held liable automatically simply because the FDIC has become a belated party to the transaction."
> 655 F.2d at 746.

The Court then went on to state as follows:

> "This is not a case such as *D'Oench* and its progeny where the maker's defense depended solely upon a secret or unrecorded agreement, usually oral, of which the FDIC could have had no notice. The defense appellant posits here arises directly and explicitly from the provisions of the leases which were in the bank's files and which the FDIC now seeks to enforce. We have not been presented with any persuasive reason why appellant's defense should not at least be tested at trial."
> 655 F.2d at 747.

In a recent decision the Tenth Circuit Court was faced with a set of facts that called for an analysis of the distinction between oral agreements and bilateral written agreements insofar as they governed the application of the *D'Oench, Duhme* doctrine.

The case of *Oklahoma Radio Associates v. Federal Deposit Insurance Corporation*, 967 F.2d. 685 (10th Cir. 1993) involved two separate promissory notes. On one note (Magnolia Note) the borrowers claimed there was an oral agreement to renew or roll over. On the other note (ORA Note) the borrowers claimed that although the face of the note reflected that it would mature in 10 months, there was written evidence in the form of a loan application and a letter from the bank officer indicating an agreement to amortize the note over a 5 year period.

The Court summarily disposed of the claim of an oral agreement to roll over the Magnolia Note and in so doing stated:

"In light of the foregoing analysis, however, we conclude that the district court correctly held that Magnolia was estopped to assert an oral agreement to roll its note into ORA's note. Unlike ORA, Magnolia can point to no written record contained in Citizen's loan files which could possibly have alerted the FDIC to a qualification not present on the face of the Magnolia note.

"As the Supreme Court stated in *Langley*, "one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities[.]" *Id.*, 484 U.S. at 93, 108 S.Ct. at 402. Magnolia is thus clearly estopped under *D'Oench* to rely on the oral agreement. Accordingly, we affirm the district court's grant of summary judgment to the FDIC on the Magnolia note and its accompanying guarantees by Collins and Armstrong."
987 F.2d 685 at 696.

However, with regard to the ORA Note which involved a written loan application and a bank officer's letter which indicated an agreement to a 5 year amortization, the Court reached the opposite conclusion. In reviewing the summary judgment of the District Court, the Court of Appeals held:

"In sum, the record does not support the summary judgment entered below against ORA on the basis of the *D'Oench* estoppel rule. There are genuine issues of material fact about the presence of the Osborne letter agreement and the

> loan application being in the loan files of Citizens, and manifesting the asserted bilateral agreement of ORA and Citizens."
> 987 F.2d 685 at 695.

In the present case it is undisputed that the loan agreement, promissory notes, deeds of trust, written memos, and actions of the loan committee were from the outset and remained in the official records of GSA and subsequently First Gibraltar.

It is respectfully submitted that both the *Howell* decision in the Seventh Circuit and the *Oklahoma Radio Associates* decision in the Tenth Circuit are in conflict with the decision in the present case on the application of the *D'Oench, Duhme* estoppel theory to a case involving bilateral obligations in written agreements.

## CONCLUSION

For the reasons contained herein, this Court should exercise its discretion and this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

**LAKE FOREST DEVELOPMENTS,**
**Plaintiff-Appellant,**

**v.**

**FEDERAL DEPOSIT INSURANCE CORPORATION,**
**As Receiver for Gibraltar Savings Association, et al., Defendants,**

**First Gibraltar Bank, FSB,**
**Defendant-Appellee.**

**No. 91-1466.**

United States Court of Appeals,
Fifth Circuit.

April 28, 1993.

(Filed Jun. 14, 1993)

Borrower sued Federal Deposit Insurance Corporation, as receiver of original lender, and also sued successor lender, claiming breach of loan agreement financing real estate development. The United States District Court for the Northern District of Texas, John H. McBryde, J., entered judgment for defendants and appeal was taken. The Court of Appeals, Garwood, Circuit Judge, held that: (1) *D'Oench, Duhme* doctrine precluded claim that lender had orally waived provision of contract stating that lender was not obligated to accept reappraisals of property for purpose of increasing loan commitment, and (2) notice of foreclosure sale was commercially reasonable, under Texas law.

Affirmed.

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Appeal from the United States District Court for the Northern District of Texas.

Before GARWOOD and EMILIO M. GARZA, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant Lake Forest Developments (Lake Forest) filed this suit against Gibraltar Savings Association (GSA) in Texas state court in 1981 alleging that GSA had breached a loan agreement by failing to fully fund Lake Forest's development of 74 acres of real property. Lake Forest subsequently defaulted on the loan, and added claims of wrongful foreclosure after GSA non-judicially foreclosed upon and purchased the property at a trustee's sale. Thereafter, the case was removed to the district court below. Lake Forest brings this appeal from the district court's grant of summary judgment in favor of First Gibraltar Bank, FSB (First Gibraltar), which came into possession of the property through an acquisition agreement with the FSLIC upon GSA's insolvency. We affirm.

**Facts and Proceedings Below**

On March 30, 1977, GSA entered into a loan agreement with Johnson-Loggins, Inc., to finance development

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* Judge John R. Brown was on the panel that heard oral argument in this case, but passed away before the decision was entered, and the case is accordingly decided by a quorum. *See* 28 U.S.C. § 46(d).

of 74 acres of real property in Denton County, Texas for residential use. The loan agreement set forth Johnson-Loggins's obligations to submit a master development plan for GSA's approval, to be followed by more specific section plans and budgets for the parts of the property that were to be platted, showing detailed plans for streets, utility lines, etc. Section 2.02(a) of the agreement provided in part:

> "[GSA] shall be obligated to furnish to [Johnson-Loggins] the amount of funds required to discharge and pay the costs of acquisitions and holding of the said property, to pay taxes, insurance and other specific direct costs of the development as set out in Section 3.04 hereinafter. . . . Gibraltar shall not be obligated to advance in excess of eighty percent (80%) of the appraised value of the subject property according to the appraisal submitted to and accepted by [GSA]. [GSA] shall not accept a reappraisal at a later date in order to increase the amount of funds to be advanced hereunder."

The direct costs listed in Section 3.04 included, *inter alia*, the cost of land, cost of improvements, property taxes, advertising and sales expenses, and recording and title fees. Section 5.01 provided that the debt was to be nonrecourse, with GSA looking for repayment solely to the property and other security provided. On the same day, Johnson-Loggins executed a $1.8 million promissory note to GSA reflecting advances that it was contemplated GSA would thereafter periodically make for expenses in developing the property. The note also reflected that the debt was nonrecourse, with GSA agreeing to look solely

to the mortgage described in a deed of trust executed contemporaneously by Johnson-Loggins for repayment.

Several months later, this loan agreement was assigned to Lake Forest, a joint venture formed by John W. McMackin (McMackin) and Robert West (West) to develop and ultimately sell the property. In October 1977 McMackin, on behalf of Lake Forest, submitted to GSA a plan and basic budget for the first phase of development of the property. The first phase included development of 22.2 acres. A November 7, 1977 GSA memorandum reflects GSA's assent to proceed based on the plan submitted by McMackin.

In January 1979, McMackin submitted to GSA a plan and budget for the second phase of development. This plan included a request for additional funds based on a reappraisal of part of the property. A GSA memorandum dated January 11, 1979 discussing this proposal shows that the property is divided into three parcels, and that Parcel 1, on which it was originally contemplated that there would be 62 lots, had been reconfigured so that it would contain 106 lots. As a consequence of this changed land plan, a new appraisal of Parcel 1 had been performed, resulting in a new total appraised value for all three tracts of $3,015, 591. The memorandum reflects that the "Loan Request at 80%" based on the new appraisal was $2,412,470, representing a request for new funds in the amount of $610,870. The plan, budget, and request were all approved by GSA.

On May 29, 1979, Lake Forest executed a promissory note to GSA in the amount of $2.96 million, renewing and extending the original $1.8 million loan. Like the previous

note, this note reflected that it evidenced a nonrecourse debt and was accompanied by a deed of trust on the property.

In late 1980, Lake Forest sought further development funding that would have increased the total loan amount to approximately $3.3 million. A November 14, 1980 GSA memorandum summarizing the request shows the requested amount to be eighty percent of the property value as calculated in an October 1980 appraisal. This memorandum, from GSA Vice-President Charles Ackerman (Ackerman), recommended that GSA grant the loan as requested. A memorandum dated February 9, 1981 reflects that Ackerman had met with McMackin and was making the following recommendations (among others) for changes in the loan agreement when it was extended: (1) that McMackin would be 100 percent liable for the loan balance, and (2) that GSA would have no further obligation to make future loans. According to a GSA memo dated February 10, 1981, the GSA loan committee approved the refinancing on the conditions suggested by Ackerman, including personal liability by McMackin. McMackin submitted to the district court documents that he claims GSA demanded that he sign in order to receive the requested additional funding for Lake Forest. These documents included a full personal guaranty of the new loan and a termination of the March 1977 loan agreement.

McMackin refused to sign these documents. On August 11, 1981, Lake Forest filed suit in Texas state court against GSA for breach of contract, seeking specific performance or damages. Lake Forest subsequently defaulted in its payments on the May 1979 note, and GSA foreclosed and purchased the property at a trustee's sale

on June 7, 1983. GSA also foreclosed upon and subsequently purchased, at two judicial sales, a total of twenty-seven promissory notes that Lake Forest had collaterally assigned to GSA as additional security. Lake Forest then amended its complaint to add claims for wrongful foreclosure.

On December 27, 1988, the Federal Home Loan Bank Board declared GSA insolvent and appointed the FSLIC as receiver. The following day, the FSLIC entered into an agreement with what was the First Texas Bank. First State Bank acquired certain GSA assets, including the property formerly owned by Lake Forest, and took the name First Gibraltar.

In January 1989, the FSLIC intervened in Lake Forest's suit and removed it to federal court. On July 27, 1989, the district court granted Lake Forest's motion for leave to join First Gibraltar as a party necessary for adjudication of rights to the property. Lake Forest's fourth amended petition, its final pleading, included the following allegations: (1) that no appraisals were submitted for the $1.8 million note, and that appraisals submitted in November 1978 and March 1979 resulted in the increase of the note to $2.96 million in May 1979; (2) that Ackerman and GSA Executive Vice-President Wiley Wisely represented to McMackin that GSA would not refuse to advance development funds based on reappraisals if Lake Forest was developing the property according to the loan agreement; (3) that McMackin relied on these representations in continuing to develop the property in phases and submit new loan requests for the different phases; (4) that GSA "has failed and refused and

continues to fail and refuse to advance adequate development funds based upon acceptable reappraisals, or on any basis, for the development of the property in accordance with the March 30, 1977, Loan Agreement"; (5) that GSA "has waived and is estopped from relying on the provision of the March 30, 1977, Loan Agreement that it was not obligated to accept reappraisals based upon the words and actions of its agents who had actual or apparent authority to bind" GSA. The complaint requested that the trustee's sale of June 7, 1983, be declared void because GSA had no justifiable cause for initiating foreclosure proceedings, and because any default by Lake Forest was directly attributable to GSA's breach of the loan agreement. In addition, the petition asked the court to set aside the June 2, 1983, public sale of twenty-one of the promissory notes assigned to GSA as collateral because the notice of the sale was inadequate, and because Lake Forest's default was caused by GSA's prior breach of the loan agreement. Lake Forest further asserted a cause of action for breach of the covenant of good faith and fair dealing implied under the common law and under Tex. Bus. & Com.Code § 1.203 (Vernon 1968).

On March 26, 1991, after substitution of the FDIC for the FSLIC as receiver for GSA, the district court entered an order granting the FDIC's and First Gibraltar's respective motions for summary judgment. Lake Forest brings this appeal as to First Gibraltar only.

## Discussion

This Court reviews a district court's grant of summary judgment *de novo*, taking the evidence and inferences to be drawn therefrom in the light most favorable

to the non-moving party, and determining whether the pleadings, depositions, answers to interrogatories, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 127 (5th Cir. 1991) (per curiam); Fed.R.Civ.P. 56(c). Summary judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Here, the burden of proof was on Lake Forest, as plaintiff.

The primary argument offered by First Gibraltar in support of the summary judgment is that Lake Forest's complaint is barred by the *D'Oench, Duhme* doctrine. The *D'Oench, Duhme* doctrine was founded on the principle that when, for the accommodation of a bank, a person executes a facially binding and unqualified obligation, he should not thereafter be permitted to escape the FDIC's enforcement of that obligation by asserting that he agreed with the bank that it would not be enforced according to its terms. *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447, 458-60, 62 S.Ct. 676, 680, 86 L.Ed. 956 (1942). The doctrine has been applied to shield the FDIC and its assignees against unrecorded side agreements that tend to deceive creditors and the public banking authorities. *Federal Deposit Insurance Corp. v. Hamilton*, 939 F.2d 1225, 1228 (5th Cir.1991); *Federal Savings & Loan Insurance Corp. v. Griffin*, 935 F.2d 691, 697 (5th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1163, 117 L.Ed.2d 410

(1992); *Porras v. Petroplex Savings Association*, 903 F.2d 379, 380-81 (5th Cir.1990).

We must agree that the *D'Oench, Duhme* doctrine is fatal to Lake Forest's claim that GSA breached the March 1977 loan agreement. As the complaint itself demonstrates, Lake Forest relies upon an alleged oral waiver by GSA of the provision of the loan agreement stating that GSA was not obligated to accept reappraisals for the purpose of increasing the loan commitment under the agreement. The essence of *D'Oench, Duhme,* however, is that such oral side agreements "do not appear on the judicial radar screen." *Bowen v. Federal Deposit Insurance Corp.*, 915 F.2d 1013, 1016 (5th Cir.1990). Judged according to the terms of the written agreement, GSA's complained of refusal to advance further funds to Lake Forest in 1981 based on a reappraisal of the property at that time (or, more precisely, its refusal to advance further funds without changing the terms of the loan agreement to require a personal guaranty) cannot be a breach of the agreement.[1] Since Lake Forest's claims of wrongful foreclosure rest upon this alleged breach, they fail under *D'Oench, Duhme.*[2]

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[1] There is no claim (or evidence) of any written waiver or agreement to accept such a reappraisal. The only Loan Agreement of which there is any evidence is that of March 30, 1977.

[2] In some respects, this is not a classic *D'Oench, Duhme* case. Lake Forest is not trying to enforce an unrecorded side agreement against the FDIC or its assignee; rather, it is arguing that *GSA's* breach of its own oral promise rendered its foreclosure under the deed of trust wrongful, and thus prevented GSA from passing clear title to the property to the *FSLIC*, and then to First Gibraltar. (Lake Forest filed a notice of *lis pendens* on the prop-

Likewise, Lake Forest cannot, consistent with *D'Oench, Duhme,* seek to prove a breach of good faith or fiduciary duty by relying on these alleged representations that are contrary to the written loan agreement. *Cf. Langley v. Federal Deposit Insurance Corp.*, 484 U.S. 86, 108 S.Ct. 396, 400-01, 98 L.Ed.2d 340 (1987) (proof of alleged fraudulent misrepresentations not reflected in the loan documents was foreclosed by *D'Oench, Duhme's* statutory counterpart, 12 U.S.C. § 1823(e)); *Texas Refrigeration Supply, Inc. v. Federal Deposit Insurance Corporation,* 953 F.2d 975, 982 n. 13, 983 & n. 15 (5th Cir.1992).

The only claim by Lake Forest that does not rely on the alleged oral modification of the loan agreement, and thus is unaffected by *D'Oench, Duhme,* is the claim that GSA's notice of the foreclosure sale for the promissory notes was inadequate. The basis for this claim is that

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erty with the Denton County Clerk on July 11, 1983.) When the FDIC comes into possession of an *instrument, D'Oench, Duhme,* in prohibiting an obligor from engrafting additional unwritten terms onto the agreement, fulfills the public policy of enabling the FDIC to rely on the bank records. *See Hamilton,* 939 F.2d at 1229-30. In the present case, by contrast, the FSLIC came into possession of a tangible piece of property that was the subject of ongoing litigation.

Though the case is thus somewhat removed, both logically and in terms of policy considerations, from the core concerns of *D'Oench, Duhme,* decisions of this Court applying the doctrine in similar circumstances convince us that it must extend to encompass the present case. *See, e.g., Texas Refrigeration Supply, Inc. v. Federal Deposit Insurance Corp.*, 953 F.2d 975, 982 n. 13, 983 & n. 15 (5th Cir.1992); *Buchanan v. Federal Savings and Loan Insurance Corp.*, 935 F.2d 83, 86 & n. 5 (5th Cir.), *cert. denied sub nom. Buchanan v. First Gibraltar Bank, FSB,* ___ U.S. ___, 112 S.Ct. 639, 116 L.Ed.2d 657 (1991).

although Lake Forest received a notice stating that twenty-one of the twenty-seven promissory notes were to be sold in bulk at a public sale at 10:00 a.m. on June 2, 1983 at the door of the Denton County courthouse, the notice did not specify the maker, principal amount, interest rate, and maturity date of each. According to a May 27, 1983 letter from McMackin's attorney objecting to the notice, the lack of this information rendered the notice inadequate because the information would be required by a bidder in advance of the sale in order to compute a fair and reasonable value for the notes. The letter alleged that the absence of that information would detrimentally affect the price received for the notes. GSA did not correct any of the alleged deficiencies. It held the sale as scheduled, and was the only bidder.

In essence, Lake Forest does not challenge the notice it received of the sale, but rather raises a question whether, given this *public* notice, GSA's sale of the collateral was commercially reasonable. *See* Tex.Bus. & Com.Code § 9.504(c) (Vernon 1991) ("Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.").

The notice in question stated that the promissory notes "are in amounts which vary between $12,250.00 and $30,600.00 and are at fixed interest rates between 9% and 11%." Although a prospective purchaser would certainly require more detailed information before making an actual bid, this notice would have sufficed to alert persons who might be interested in buying the notes to the

sale. Lake Forest does not allege that more detailed information would not have been available to a purchaser who made inquiries to GSA or who attended the sale. Without such allegations, Lake Forest has failed to raise a genuine issue of material fact regarding commercial reasonableness; in few, if any, sales could a buyer confidently make a bid based solely on a notice or advertisement.

**Conclusion**

We conclude, based on the summary judgment evidence presented by both sides, that Lake Forest failed to raise a genuine issue of material fact that could have entitled it to recovery. Accordingly, the summary judgment granted in favor of First Gibraltar is

AFFIRMED.

A true copy
Test:
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ Cindy Veasey
Deputy,

New Orleans Louisiana
JUN 11, 1993

**APPENDIX B**

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 91-1466

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D.C. Docket No. CA4-89-94-A

LAKE FOREST DEVELOPMENTS,

Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,
As receiver for Gibraltar Savings
Association, ET AL.,

Defendants,

FIRST GIBRALTAR BANK, FSB,

Defendant-Appellee.

(Filed Apr 28, 1993)

Appeal from the United States District Court
for the Northern District of Texas

Before GARWOOD and EMILIO M. GARZA, Circuit Judges.[1]

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[1] Judge John R. Brown was on the panel that heard oral argument in this case, but passed away before the decision was entered, and the case is accordingly decided by a quorum. See 28 U.S.C. § 46(d).

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in favor of First Gibraltar is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:
JUN 11 1993

April 28, 1993

A true copy

Test:

Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ Cindy Veasey
Deputy Jun 11, 1993
New Orleans, Louisiana

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

| | | |
|---|---|---|
| LAKE FOREST DEVELOPMENTS, | $ | |
| Plaintiff, | $ | |
| | $ | CIVIL ACTION |
| vs. | $ | NO. |
| FEDERAL DEPOSIT INSURANCE | $ | CA4-89-094-A |
| CORPORATION AS RECEIVER | $ | (Filed |
| FOR GIBRALTAR SAVINGS | $ | March 26, 1991) |
| ASSOCIATION, ET AL, | $ | |
| | $ | |
| Defendant. | $ | |

ORDER

Came on for consideration the motion of defendant First Gibraltar Bank FSB to dismiss or for summary judgment and the motion of plaintiff, Lake Forest Developments, for partial summary judgment. The court, having considered the motions, the responses thereto, and the summary judgment evidence, finds that First Gibraltar's motion for summary judgment should be granted and that plaintiff's claims against said defendant should be dismissed.

The court ORDERS that First Gibraltar's motion for summary judgment be and is hereby granted and plaintiff's claims against said defendant be and are hereby dismissed. Plaintiff shall bear all costs of court.

SIGNED March 26, 1991.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

ENTERED ON DOCKET
4-2-91 PURSUANT
TO F.R.C.P. RULES
58 AND 79a

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## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

| | | |
|---|---|---|
| LAKE FOREST DEVELOPMENTS, Plaintiff, | $ | |
| vs. | $ | CIVIL ACTION NO. CA4-89-094-A |
| FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR GIBRALTAR SAVINGS ASSOCIATION, ET AL, | $ | (Filed March 26, 1991) |
| Defendant. | $ | |

ORDER

Came on for consideration the motion of defendant Federal Deposit Insurance Corporation as receiver for Gibraltar Savings Association ("FDIC receiver"), for summary judgment. The court, having considered the motion, the summary judgment evidence, and the response of plaintiff, Lake Forest Developments, thereto, finds that the motion is well-taken and should be granted. The court finds that FDIC receiver does not possess any assets from which recovery on a judgment against it can ever be had. *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205 (5th Cir. 1989).

The court ORDERS that FDIC receiver's motion for summary judgment be and is hereby granted and plaintiff's claims against FDIC receiver be and are hereby dismissed. As between plaintiff and FDIC receiver, all costs shall be borne by plaintiff.

SIGNED March 26, 1991.

/s/ John McBryde
JOHN McBRYDE
United Sates District Judge

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

| | | |
|---|---|---|
| LAKE FOREST DEVELOPMENTS, | $ | |
| Plaintiff, | $ | |
| | $ | CIVIL ACTION |
| vs. | $ | NO. |
| FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR GIBRALTAR SAVINGS ASSOCIATION; ET AL, | $ | CA4-89-094-A |
| | $ | (Filed |
| | $ | March 26, 1991) |
| | $ | |
| | $ | |
| Defendant. | $ | |

JUDGMENT

In accordance with the court's orders of even date herewith,

The court ORDERS, ADJUDGES and DECREES that plaintiff's claims against defendants in the above-styled and numbered action be, and are hereby, dismissed. Plaintiff shall bear all costs of court.

SIGNED March 26, 1991.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

ENTERED ON DOCKET
4-2-91 PURSUANT
TO F.R.C.P. RULES
58 AND 79a.

**APPENDIX F**

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 91-1466

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LAKE FOREST DEVELOPMENTS,

Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,
As receiver for Gibraltar Savings
Association, ET AL.,

Defendants,

FIRST GIBRALTAR BANK, FSB,

Defendant-Appellee.

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Appeal from the United States District Court
for the Northern District of Texas

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**ON PETITION FOR REHEARING**

(Filed Jun 1, 1993)

Before GARWOOD and EMILIO M. GARZA, Circuit Judges.*

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* Judge John R. Brown was on the panel that heard oral argument in this case, but passed away before the decision was entered, and the case is accordingly decided by a quorum. See 28 U.S.C. § 46(d).

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Walt Garwood
United States Circuit Judge

## APPENDIX G

## LOAN AGREEMENT

THIS AGREEMENT made and entered into as of the 30th day of March, 1977, by and between GIBRALTAR SAVINGS ASSOCIATION, a Texas savings and loan association, hereinafter called "Gibraltar," and JOHNSON-LOGGINS, INC., a Delaware Corporation, hereinafter called "Owner",

### WITNESSETH:

In consideration of the premises and the mutual covenants and agreements hereinafter set forth, the parties hereto hereby agree as follows:

### ARTICLE I

### CREATION, PURPOSE AND SCOPE OF AGREEMENT

Section 1.01. CREATION – There has heretofore been acquired by Owner that certain property described in Exhibit "A" hereto (hereinafter sometimes called "said property" or "the development"), which Exhibit is incorporated herein by reference for all purposes. Said property shall be developed and sold as hereinafter provided. The purpose and scope of this Agreement is to set out the obligations, responsibilities, rights and entitlements of the parties hereto. It is intended that Owner, with financing by Gibraltar as hereinafter provided, will develop and sell said property in accordance with the terms hereof.

Section 1.02. PURPOSE AND SCOPE – This Agreement shall be limited strictly to the financing, developing, operating and selling or otherwise disposing of said property, and shall not be extended by implication or otherwise except by the written agreement of the parties hereto.

Section 1.03. LENDER/BORROWER RELATIONSHIP – The relationship between the parties under this Agreement shall be that of lender/borrower and in no event interpreted as that incident to a partnership or joint venture. Except as otherwise expressly and specifically provided in this Agreement, neither of the parties have any authority to act for, or to assume any obligation or responsibility on behalf of the other party.

Section 1.04. DECISIONS AND APPROVALS –

(a) The following matters ("Major Decisions") shall require the unanimous approval of both parties hereto:

(1) Adoption of the Master Plan of Development;

(2) Adoption of each Section plan;

(3) Adoption of each Section Capital Improvement Budget;

(4) Adoption of each Section Operating Budget;

(b) Owner shall submit the various Budgets in form and content as hereinafter set forth, and Gibraltar shall have the right to approve said Budgets under terms provided hereinafter. All funds advanced from the loan hereafter described shall be advanced for

the purpose of paying those items specifically approved in the budgets.

(c) All other decisions regarding the use, sale and development of the said property shall be made by Owner. Gibraltar shall, however, upon request of Owner provide its recommendations and guidance in other areas of operation concerning the said property.

## ARTICLE II

## DEVELOPMENT AND SALE OF THE SAID PROPERTY

Section 2.01. DEVELOPMENT OF THE PROPERTY –

(a) As to said property a Master Plan for the development thereof has been, or will be, submitted by Owner and must be acceptable to Gibraltar.

(b) Upon approval of the Master Plan as aforesaid, Owner shall cause to be prepared, at the expense of the development, the following:

(1) A section plan ("Section Plan") which shall show the specific section or sections of the property which are then proposed to be platted, and detailed plans for Utility lines, streets and other capital improvements;

(2) A budget (the "Section Capital Improvement Budget") which shall show the estimate, as made by Owner,

of the anticipated costs of the improvements proposed for the particular section, as contemplated by the Section Plan;

(3) A budget (the "Section Operating Budget") which shall show the estimate, as made by Owner, of the anticipated receipts and disbursements of the development in connection with the operation of that particular section (excluding costs of capital improvements) for the next calendar year.

If Gibraltar fails or refuses to approve any Section Plan, or any above designated Budget, then the Owner shall not proceed to implement such Plan or Budget; however, if such Plan or Budget has been approved by Gibraltar, then Owner shall proceed to implement such Plan and Budget, and the further consent or approval of Gibraltar to the detailed actions necessary to implement such Plan or Budget and the method or manner of performance by Owner shall not be required, provided that such actions in performance are consistent with such approved Plan and Budgets.

(c) After the said property has been platted in accordance with the Section Plan, Owner shall cause the improvements therefor to be constructed so that said property will be improved into lots ready for sale.

(d) Owner shall not expend any funds advanced by Gibraltar or incur any liabilities on behalf of the development so as to cause any lien superior to Gibraltar's lien to be placed on the said property.

SECTION 2.02. FINANCING OF PURCHASE AND DEVELOPMENT –

(a) Gibraltar shall be obligated to furnish to Owner the amount of funds required to discharge and pay the costs of acquisitions and holding of the said property, to pay taxes, insurance and other specific direct costs of the development as set out in Section 3.04 hereinafter, such funds to be represented by a note or notes, the principal of which shall be due and payable on or before five years from date hereof, and as security therefor Gibraltar shall have liens against the property. The liens shall be created by mortgage instruments in form and substance as required by Gibraltar, Notwithstanding anything contained herein to the contrary, Gibraltar shall not be obligated to advance in excess of eighty percent (80%) of the appraised value of the subject property according to the appraisal submitted to and accepted by Gibraltar. Gibraltar shall not accept a reappraisal at a later date in order to increase the amount of funds to be advanced hereunder. Notwithstanding the face amount of the loans made pursuant hereto, in instances where liens superior to those of Gibraltar encumber the said property, there shall be withheld by Gibraltar funds in a sufficient amount to satisfy such prior indebtednesses as specifically set forth in the notes. In the event that Owner fails to pay and discharge any such prior indebtedness, or if Gibraltar deems it to be in its best interest to retire such prior indebtedness, then Gibraltar at its option may pay and discharge the same

from these restricted funds without waiver of any of its rights hereunder, and the sums so expended for such purposes shall become a part of the debt evidenced by the loan and shall draw interest from date so expended until paid.

(b) All monies advanced by Gibraltar pursuant to this Agreement shall earn interest only for the time such funds are actually outstanding; and same shall draw interest at the rate of one and one-half percent (1½%) per annum above the prime rate changed from time to time by the Federal Home Loan Bank to its member associations for advances for terms of one (1) year. Such rate will change from time to time on the same dates that the Federal Home Loan Bank Board changes its rates.

(c) All loans to be made by Gibraltar hereunder must comply with applicable governmental rules and regulations to which it is subject as a savings and loan association, including appraisal and lending limitations.

Section 2.03. PARTIAL RELEASES –

(a) Partial releases shall be given in accordance with and pursuant to the schedule contained in Exhibit "B" attached hereto and made a part hereof.

Section 2.04. PERMANENT FINANCING, RIGHT OF FIRST REFUSAL – Gibraltar shall have the right of first refusal on all permanent loans on residential or commercial improvements located on the said property where it is within the ability of Owner to direct such

loans, such right to be subject to Gibraltar's willingness to furnish interim and permanent financing in line with current market and competitive conditions.

## ARTICLE III
## ACCOUNTING, REPORTS AND DIRECT COSTS

Section 3.01. ACCOUNTING – Owner shall maintain all books of account and other financial records of the development. Such books of account and other records shall be open to inspection by Gibraltar at any time during reasonable business hours at Owner's office. At the request of either party, but not more often than one time each calendar year, such books of account and other records shall be audited by a firm of independent certified public accountants acceptable to both parties hereto. Such books of account shall clearly indicate that all funds advanced by Gibraltar hereunder have been utilized pursuant to the approved Budgets set forth above.

Section 3.02. OVERHEAD COSTS AND DIRECT COSTS

(a) Owner shall not be entitled to receive reimbursement from the loan proceeds for overhead costs or similar indirect expenses relating to the services connected with the development.

(b) Out-of-pocket direct costs or expenses reasonably incurred by Owner in the performance of any of its duties hereunder and specifically approved in the Budgets shall be reimbursed to it from the loan proceeds and shall be considered as an expense of the development. The estimated amount of

costs of Owner which are subject to reimbursement under this Section shall be included in the Budgets which Owner submits to Gibraltar for approval. Such direct costs are more specifically set out in Section 3.04 hereafter.

Section 3.03. REPORTS – Owner shall deliver to Gibraltar, not less often than one time each calendar month, a report of the activities of the development for the immediate preceeding calendar month. Such report shall contain such operational and accounting details as Gibraltar reasonably requests. At the request of Gibraltar, Owner shall, at reasonable intervals, convene meetings of the parties hereto for a discussion of such report and all activities of the development relative thereto or otherwise.

Section 3.04. DEFINITION OF DIRECT COSTS – Direct costs as mentioned in Section 3.02(b) above will be limited to the following:

(a) cost of land;

(b) cost of improvements

(c) advertising

(d) property taxes;

(e) sales expenses, and commissions

(f) recording and title fees;

(g) insurance expense;

(h) payroll taxes;

(i) audit or audits provided for in Paragraph 3.01 above;

(j) seller's closing costs and sales of said property;

(k) general upkeep and maintenance of said property including utilities;

(l) general costs of administration of the development;

(m) attorney's fees incurred in connection with this development;

(n) reasonable and necessary expense of preparing a master plan.

The amount of such direct costs as set out above must be included in the Budgets provided for above, and approved by Gibraltar. The payment of such costs once budgeted and approved must be applied for and paid on a current monthly basis. All other expense, unless specifically approved by Gibraltar, will be deemed to be overhead and will not be an expense of the development.

## ARTICLE IV
## TERMINATION

Section 4.01. DEFAULT AND TERMINATION - In the event of (a) insolvency or appointment of a receiver of Owner, (b) the execution by Owner of an assignment for the benefit of creditors, (c) the institution of proceedings by or against Owner under any bankruptcy, reorganization, debtor's relief or insolvency law now or hereafter existing, (d) the appointment of a receiver of the said property, (e) the default under the legal documents evidencing the loans to be made under this Loan Agreement, or (f) failure to perform the covenants and/or agreements contained in this Loan Agreement, this agreement shall

automatically terminate and Gibraltar shall have its remedies under the loan documents.

## ARTICLE V
## GENERAL

Section 5.01. LIABILITY – The monetary obligation of Owner shall be non-recourse with Owner assuming no liability for repayment. Gibraltar agrees to look exclusively to the security for repayment of such monetary obligations.

Section 5.02. SEVERABILITY – If any provision of this Agreement or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Agreement and the application of such provision to other persons or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

Section 5.03. ENTIRE AGREEMENT – This Agreement contains the entire Agreement between the parties hereto relative to the said property. No variations, modifications or changes herein or hereof shall be binding upon either party hereto unless set forth in a document duly executed by an authorized officer or other agent of such party.

Section 5.04. TERMINOLOGY – All personal pronouns used in this Agreement, whether used in the masculine, feminine or neuter gender, shall include all genders; the singular shall include the plural and vice versa. Titles of Articles and Sections are for convenience

only and neither limit nor amplify the provisions of the Agreement itself.

Section 5.05. BINDING AGREEMENT – This Agreement shall inure to the benefit of and be binding upon the undersigned parties and their respective heirs, executors, successors and assigns if any permitted under this Agreement. Whenever in this instrument a reference to any party is made, such reference shall be deemed to include a reference to the heirs, legal representatives, successors and assigns of such party; however, this Section does not constitute a consent to any assignment or transfer other than pursuant to and in accordance with the other provisions of this Agreement.

EXECUTED at Houston, Texas, in duplicate originals on the date first set forth above.

ATTEST:

/s/ Nita Chessher
Asst. Secretary

ATTEST:

/s/ Richard Therrien
Asst. Secretary

GIBRALTAR SAVINGS ASSOCIATION

By: /s/ Wylie R. Wisely
Exec. V-President

JOHNSON-LOGGINS, INC.

By: /s/ J.M. Tipps
Vice President

## APPENDIX H

## ASSIGNMENT OF LOAN AGREEMENT

WHEREAS, GIBRALTAR SAVINGS ASSOCIATION, a Texas savings and loan association, hereinafter called "Gibraltar" entered into a loan agreement with JOHNSON-LOGGINS, INC., a Delaware corporation therein called "owner" and herein called "assignor" dated as of March 30, 1977 (the "loan agreement"), the loan agreement relating to the property described on Exhibit "A" which is attached hereto and made a part hereof for all purposes which property is hereinafter referred to as the "property";

WHEREAS, assignor has conveyed all of its rights, titles and interest in and to the property unto JOHN W. McMACKIN and BEN HOGAN hereinafter collectively referred to as "assignee" and assignor desires to transfer unto assignee all of its rights, benefits and entitlements under the loan agreement;

NOW THEREFORE, know all men by these presents that for and in consideration of the mutual benefits and detriments the undersigned assignor, assignee and Gibraltar agree as follows:

(1) Assignor has transferred, assigned and conveyed and does hereby transfer, assign and convey unto assignee all of the rights and entitlements and benefits of assignor under the loan agreement.

(2) Assignee assumes all obligations of assignor under the loan agreement and any instruments to be executed in connection therewith, subject, however, to the

limitation of liability contained in Section 5.01 of the loan agreement.

(3) Gibraltar consents to this assignment and agrees that from and after the date hereof assignor shall have no liability or obligation under the loan agreement or any instruments executed in connection therewith.

This agreement shall be binding upon and inure to the benefit of the respective heirs, legal representatives, successors and assigns of the parties hereto.

Executed in Houston, Harris County, Texas as of March 30, 1977.

JOHNSON-LOGGINS, INC.

By: /s/ J.M. Tipps
Vice President "Assignor"

/s/ John M. McMackin
JOHN W. McMACKIN
"Assignee"

/s/ Ben Hogan
BEN HOGAN "Assignee"

GIBRALTAR SAVINGS
ASSOCIATION

/s/ Wylie R. Wisely

## APPENDIX I

$1,800,000.00 Houston, Harris County, Texas March 30, 1977

JOHNSON-LOGGINS, INC. (hereinafter called "Maker"), for value received, agrees to pay on or before March 30, 1978, and as herein provided, unto the order of GIBRALTAR SAVINGS ASSOCIATION (hereinafter called "Payee"), at its office at 2302 Fannin Street, Houston, Harris County, Texas, in coin or currency of the United States of America which at the time of payment is legal tender for the payment of public and private debts, the principal sum of ONE MILLION EIGHT HUNDRED THOUSAND AND NO/100 DOLLARS ($1,800,000.00). Interest on the principal balance of this note shall be at one and one-half percent (1½%) above the prime rate charged from time to time by the Federal Home Loan Bank to its member associations for advances for terms of one (1) year (which interest rate shall be adjusted or altered each time the Federal Home Loan Bank changes its rate on such one (1) year advances). Interest at the rate of ten percent (10%) per annum shall be earned on all past due principal and interest from and after maturity until paid.

Accrued interest shall be payable on the first day of October, 1977, and quarterly thereafter until all sums called for hereunder have been paid in full as well as at maturity hereof.

Maker shall be entitled to a total of four (4) successive renewals of the maturity of this note of one (1) year each, provided that it is current in all respects and Maker is not in default under the terms of the Deed of Trust

below mentioned on the beginning date of each renewal period.

This is a non-recourse note with Maker assuming no liability for repayment and Payee agreeing to look exclusively to the security hereinafter described for repayment.

In the event default is made in the payment of any interest installments or in the performance of any of the obligations, covenants or agreements legally imposed by the terms of this note or in the Deed of Trust securing its payment, at the option of the holder, the whole indebtedness evidenced hereby may be declared due and payable without presentment or demand for payment or notice of the exercise of such option by the holder, and may be collected by suit or by the exercise of the powers contained in the Deed of Trust.

Not all of the principal of this note is to be advanced on date hereof. The principal of this note represents funds which, it is contemplated, will be advanced by Payee to Maker hereof from time to time incident to the property described hereinafter and construction of certain improvements thereon. Such advances shall be made in increments which will aggregate in total the principal sum of this note. Each such sum so advanced shall constitute a part of the principal hereof and shall bear interest from the respective date of the advancement thereof.

The payment of this note is secured by a second lien described in that certain Deed of Trust of even date herewith conveying in trust to Edgar W. Monteith, Trustee for Payee, the property described in Exhibit "A" attached hereto and incorporated herein for all purposes.

Said lien is second and inferior to those certain outstanding liens on said property being (i) vendor's lien retained in deed dated October 23, 1973, executed by Harry G. Seeligson, et al to Johnson-Loggins, Inc., securing note of even date in the amount of $1,169,086.42 payable to Harry G. Seeligson, et al, additionally secured by (ii) Deed of Trust of even date to William F. Douglas, Trustee, filed for record in Denton County, Texas, on November 12, 1973, under County Clerk's File No. 22518. It is expressly agreed and understood between the parties hereto that Payee shall pay all of the unpaid balance, principal and interest, now owing upon said note and the liens securing same. It is agreed that in the event of default by the said Payee in payment of said note and the liens securing same and/or performance of the obligations imposed by and set forth in said note and the mortgage instruments securing same, and in the further event that Maker shall pay all or part of the unpaid balance owing upon said note, the amount of such payment shall be deducted from the amount owing hereunder.

Any provision of this note to the contrary notwithstanding, Maker shall not pay or be obligated to pay, and the holder of this note shall not collect and does not intend that the Maker pay, interest in an amount in excess of the maximum interest rate allowed by the usury laws of the State of Texas. If at any time it is determined that the interest called for by this note is in excess of the maximum rate of interest lawfully payable under this note by Maker pursuant to the laws of the State of Texas applicable at the time, then, at the option of the holder of this note, Maker shall either (1) pay interest at such

maximum rate of interest, or (2) make the payments as originally contemplated but apply on the unpaid principal balance the part of the amount so determined to be in excess of such maximum rate of interest, with any excess to be returned to Maker.

It is hereby specially [sic] agreed that if this note is placed in the hands of an attorney for collection, or if collected by suit or through the Probate or Bankruptcy Court, Maker agrees to pay in addition to the amount of principal and interest due hereon the amount of attorney's fees and costs reasonably incurred for such collection, but in no event less than ten percent (10%).

Maker hereby waives presentment for payment, demand, protest, diligence, notice of the exercise of the option to accelerate the maturity of this note and suit.

ATTEST: JOHNSON-LOGGINS, INC.

/s/ Richard Therrien
Secretary

By /s/ J.M. Tipps
Vice President

(SEAL)

## APPENDIX J

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| | | |
|---|---|---|
| THE STATE OF TEXAS | ) | KNOW ALL MEN BY |
| COUNTY OF DENTON | ) | THESE PRESENTS: |
| | ) | DEED RECORDS |

23320

### QUITCLAIM DEED

THAT BEN HOGAN of the County of Tarrant, State of Texas, for and in consideration of the sum of TEN DOLLARS ($10) in hand paid by the grantee herein named, the receipt of which is hereby acknowledged, has QUITCLAIMED, and by these presents does QUITCLAIM unto JOHN W. McMACKIN of the County of Tarrant, State of Texas, all of his right, title, and interest in and to the real property situated in Denton County, Texas, more particularly described in Exhibit A attached hereto.

This conveyance is made subject to the extent the same are valid and enforceable to the following:

(1) A Deed of Trust from Johnson-Loggins, Inc., to Edgar Monteith as Trustee, which secures a non-recourse note in the original principal amount of $1,800,000 executed by Johnson-Loggins, Inc., dated March 30, 1977, and bearing interest and payable as therein set out; and

(2) Any and all restrictions, easements, rights-of-way, conditions, liens, or reservations reflected by instruments of record with the County Clerk of Denton County, Texas.

TO HAVE AND TO HOLD all of his rights, title, and interest in and to the property and premises described on

Exhibit A attached hereto unto the said grantee, his heirs and assigns forever, so that neither I nor my heirs, legal representatives, or assigns shall have, claim, or demand any right or title to the aforesaid property, premises, or appurtenances, or any part thereof.

EXECUTED this 14 day of September, 1977, effective the 30th day of March, 1977.

/s/ Ben Hogan
BEN HOGAN

THE STATE OF TEXAS )
)
COUNTY OF TARRANT )

BEFORE ME, the undersigned, a Notary Pubic in and for said County and State, on this day personally appeared BEN HOGAN, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 14th day of September, 1977.

/s/ Melinda Watts
Notary Public in and for
Tarrant County, Texas

## APPENDIX K

THE STATE OF TEXAS )
)
COUNTY OF DENTON )

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KNOW ALL MEN BY THESE PRESENTS:

DEED RECORDS 29493

SPECIAL WARRANTY DEED

THAT JOHN W. McMACKIN of the County of Tarrant, State of Texas, for and in consideration of the sum of Ten Dollars ($10) and other good and valuable consideration to the undersigned paid by the Grantee herein named, the receipt of which is hereby acknowledged, has GRANTED, SOLD, and CONVEYED, and by these presents does GRANT, SELL, and CONVEY, unto LAKE FOREST DEVELOPMENTS, a Joint Venture composed of JOHN W. McMACKIN and ROBERT G. WEST, both of Tarrant County, Texas, all of the real property located in Denton County, Texas, more particularly described on Exhibit A attached hereto and made a part hereof for all purposes.

This conveyance is made by the Grantor and accepted by the Grantee subject, to the extent the same are valid and enforceable, to the following:

(1) A Deed of Trust from Johnson-Loggins, Inc., to Edgar Monteith as Trustee, which secures a non-recourse note in the original principal amount of $1,800,000 executed by Johnson-Loggins, Inc., dated March 30, 1977, and bearing interest and payable as therein set out; and

(2) Any and all restrictions, easements, rights-of-way, conditions, liens, or reservations reflected by instruments of record with the County Clerk of Denton County, Texas.

TO HAVE AND TO HOLD the premises described on Exhibit A attached hereto and made a part hereof for all purposes, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Grantee, its successors and assigns forever; and JOHN W. McMACKIN does hereby bind himself, his heirs and assi ns, to WARRANT and FOREVER DEFEND all and singular the said premises unto the said Grantee, its successors and assigns, against every person whomsoever lawfully claiming, or to claim, the same or any part thereof, by, through, or under me, but not otherwise.

EXECUTED this 30th day of November, 1977, effective the 30th day of March, 1977.

/s/ John W. McMackin
JOHN W. McMACKIN

THE STATE OF TEXAS )
)
COUNTY OF TARRANT )

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared JOHN W. McMACKIN, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 30th day of November, 1977.

/s/ Melinda Watts
Notary Public in and for
Tarrant County, Texas

(SEAL)

My commission expires:

October 25, 1979

## APPENDIX L

MEMORANDUM

TO: Mr. Edgar Monteith

FROM: Charles R. Ackerman

DATE: November 7, 1977

RE: Hogan – Mc Mackin Tract

Mr. Mc Mackin was in on November 4 and reviewed his first 40 lot section of 22.2 acres. We have agreed to proceed on this work.

He is requesting a name change on the Loan Agreement, and Assignment of Loan Agreement to "Lake Forest Developments, A Joint Venture", instead of the existing "John Mc Mackin".

Will you please make the necessary amendments to the various documents to effect this change? I will provide any information you require.

sdg

cc: Wylie Wisely
Nita Chessher

## APPENDIX M

MEMORANDUM

TO: Leroy Land

FROM: Charles R. Ackerman

SUBJ: Lake Forest Village – Loan Feasibility Study (John McMackins tract at Trophy Club

DATE: January 11, 1979

I. Scope

This memo reviews a loan request for $2,412,240. It is basically an increase in an existing loan, where a part of the property (Parcel) has been reappraised due to a changed land plan, yielding 106 lots instead of the original planned 62 lots. The amount of new money requested is $610,870.

II. Review of Existing Loan

A. General

Loan #4813 was made in May, 1977 as an acquisition and development loan based on 73.35 acres, for $1,802,000. There were three (3) parcels:

1. Original land configuration

Parcel 1 - 36.47 acres - 62 lots
Parcel 2 - 24.15 acres - 54 lots
Parcel 3 - 12.73 acres - 32 lots
73.35 acres 148 Total lots

1.344 acres deeded at a later date

74.694 Total acres

2. Current land configuration

| | | | |
|---|---|---|---|
| Parcel 1- Phase 1 - | 14.17 acres | 43 lots | (13 sold) |
| Parcel 1- Phase 2 - | 14.844 acres | 35 lots | (none sold) |
| Parcel 1- Phase 4 - | 8.8 acres | 28 lots | (none sold) |
| | 37.814 acres | 106 lots | |
| Parcel 2 - | 24.15 acres | 54 lots | |
| Parcel 3 - | 12.73 acres | 32 lots | |
| Total | 74.694 acres | 192 lots | |

B. Current Appraisal (dated November 20, 1978)

The appraisal reflects the following values:

| | | |
|---|---|---|
| Phase 1 - 30 lots -ASP | $24,067 | 722,010 |
| Phase 2 - 35 lots -ASP | 19,986 | 699,510 |
| Phase 4 - 28 lots -ASP | 16,036 | 449,008 |
| 93 | | 1,870,528 |

The appraisal then shows a 2% quarterly compounded appreciation factor, based on a sales period of 26 months ending February 1981. (Please refer to page 26 of the appraisal)

| | |
|---|---|
| $ 1,870,528 | Current Value |
| 147,563 | Appreciation factor |
| $ 2,018,091 | Total Value |

C. Proposed Loan

| | |
|---|---|
| $ 2,018,091 | Gross sales potential, new appraisal |
| 997,500 | Value of Parcels 2 & 3, old appraisal |
| $ 3,015,591 | Total Appraisal |

$ 2,412,470 Loan request at 80%

D. Status of Current Loan

$ 1,466,576 Loan Balance December 31, 1978
92,006 Draw #12 now in house

$ 1,558,582 Projected loan balance

E. Use of Funds

$ 2,412,470 Proceeds of proposal loan
- 1,558,582 Repay existing loan
853,888 Remaining funds
- 108,000 Complete Phase I but primarily for commission and carry on loan.
- 375,000 Complete Phase II estimated sale commission and carry.
- 209,132 Complete Phase IV estimated sales commission and carry.

$ 161,756 Raw land carry & G&A

The developer estimated raw land carry and G&A to be $220,000 during the period. This means $58,244 will have to be provided by the developer.

III. Summary and Recommendations

I call your attention to the manner in which the price escalation is computed. (see page 26 of appraisal) I also point our[sic] that the proposed loan would use the value of 86 additional lots to be developed in Parcel 2 & 3 but that funds to develop these are not available from the proceeds of this loan.

Finally, I point our [sic] that it is imperative that funds earmarked be used for the purpose of developing the property and not used for interest on the

raw land loan; this would give us an extremely high base if we were, for any reason, required to take back the property.

Parcel 2 - 24.15 acres
Parcel 3 - 12.73 acres

36.88 acres

| | |
|---|---|
| $997,500 | Appraised Value |
| 798,000 | Loan amount @80% |
| $ 21,638 | Per acre value, before any further interest is added |

Please advise me of your feelings in this matter.

CRA/hm

cc: W.Wisely
M. Barsi

Enclosure: (Previously hand carried)
Appraisal of Parcel I,
dated November 13, 1978

## APPENDIX N

### PROMISSORY NOTE

$2,960,000.00 Houston, Harris County, Texas May 29, 1979

FOR VALUE RECEIVED, the undersigned, John W. McMackin, for and on behalf of LAKE FOREST DEVELOPMENTS, a Joint Venture composed of John W. McMackin and Robert G. West, (hereinafter called "Maker"), hereby promises to pay on or before five (5) years from the date hereof, to the order of GIBRALTAR SAVINGS ASSOCIATION, (hereinafter called "Payee"), at its principal office at 2302 Fannin Street, Houston, Harris County, Texas, or at such other place as the holder hereof may from time to time designate, the principal sum of TWO MILLION NINE HUNDRED SIXTY THOUSAND AND NO/100 DOLLARS ($2,960,000.00) together with interest on all amounts remaining unpaid hereon from time to time from the date hereof until maturity, payable quarter-annually on the first day of each January, April, July, and October during the term hereof and at maturity at a rate per annum (based on a year of 360 days) through date of maturity, which interest rate shall be the greater of either:

(a) one and one-half percent (1-1/2%) above the Federal Home Loan Bank Board rate for one year money during the quarter immediately preceding the date on which such interest is due; or,

(b) nine percent (9%) per annum.

If any payment of principal or interest on this note shall become due on a Saturday, Sunday or public holiday under the laws of the State of Texas or on any other day

on which banking institutions are authorized or obligated by law to close in the State of Texas, such payment shall be made on the next succeeding business day and such extension of time shall in such case be included in computing interest in connection with such payment.

Payments of both principal and interest are to be made in lawful money of the United States of America.

In the event Maker shall (i) default in the payment of any installment, or in the performance of any of the obligations, covenants or agreements legally imposed by the terms of this note or the Deed of Trust securing its payment, or (ii) apply for or consent in writing to the appointment of a receiver, trustee, or liquidator of Maker or the real property securing this note, or (iii) file a voluntary petition in bankruptcy, or admit in writing Maker's inability to pay Maker's debts as they come due, or (iv) make a general assignment for the benefit of creditors, or (v) file a petition or answer seeking reorganization or re-arrangement with creditors or taking advantage of any insolvency law, or (vi) file an answer admitting the material allegations of a petition filed against Maker in any bankruptcy, reorganization, insolvency or similar proceedings, at the option of the holder, the whole indebtedness evidenced hereby may be declared due and payable whereupon the entire unpaid principal balance of this note and all interest accrued thereon shall thereupon at once mature and become due and payable without presentment or demand for payment or notice of the intent to exercise such option or notice of the exercise of such option by the holder, or notice of any kind, all of which are hereby expressly waived by Maker, and may be collected by suit or other

legal proceedings or by the exercise of the powers contained in the Deed of Trust.

/s/ JWMc
Initialed for Identification

It is further agreed that upon this note becoming or being declared due and upon the same being placed in the hands of an attorney for collection (whether or not suit is filed), or if collected by suit or legal proceedings or through the Probate or Bankruptcy Court, the Maker of this note agrees to pay an additional amount equal to ten percent (10%) of all sums then due hereon, including principal and interest, as attorney's fees and expenses of collection.

A portion of the principal of this note represents funds which it is contemplated will be advanced by Payee to Maker from time to time for the interest carry on this indebtedness. Each such sum so advanced shall constitute a part of the principal hereof and shall bear interest from the respective date of the advancement thereof.

A portion of the principal of this note represents funds presently owing to Payee evidenced by a note executed by Johnson-Loggins, Inc. dated March 30, 1977, in the original amount of $1,800,000.00, ("Original Note"). This note represents a partial renewal, extension and rearrangement of said Original Note according to the terms hereof. A release of the security property hereinafter described from the liens securing this note shall operate to release such property from the liens securing the Original Note.

The payment of this note is secured by a lien in a Deed of Trust of even date herewith conveying in trust to

John T. Simms, Trustee, the real property described in Exhibit "A" attached hereto and incorporated herein for all purposes.

Notwithstanding anything to the contrary contained herein, and/or the Deed of Trust securing this note, and/or any other related documents which would impose liability, Maker shall not in any event have any liability for the payment of this note, or for any other sum owing under the terms of the Deed of Trust securing this note in the event of default; rather, Payee shall look solely to the above described real property and other additional security available to Payee, for satisfaction of this indebtedness, and no suit for deficiency shall be filed against Maker on this note. The limitation imposed by the terms of this paragraph shall not impair the liens securing this note.

Any provision of this note, the Deed of Trust above described, or any other document securing the payment hereof to the contrary notwithstanding, the interest rate hereof shall never exceed the maximum rate allowed by the usury laws of the State of Texas. Maker shall not pay or be obligated to pay, and the holder of this note shall not collect and does not intend that the Maker pay, interest in an amount in excess of the maximum interest rate allowed by the usury laws of the State of Texas. If at any time it is determined that the interest called for by this note is in excess of the maximum rate of interest lawfully payable under this note pursuant to the laws of the State of Texas applicable at the time, then, at the option of the holder of this note, Maker shall either (1) pay interest at such maximum rate of interest, or (2) make the payment

as originally contemplated, but apply on the unpaid principal balance the amount so determined to be in excess of such maximum rate of interest, with any excess to be returned to Maker.

All past due principal and interest of this note, whether due as a result of acceleration of maturity or otherwise, shall bear interest from maturity until paid at the rate of ten percent (10%) per annum.

The Maker waives presentment for payment, demand, protest, notice thereof and dishonor, and diligence in collecting or notice of the intent to exercise such option or notice of the exercise of the option to accelerate the maturity of this note, and consents that the time of payment may be extended from time to time without notice.

LAKE FOREST DEVELOPMENTS,
A JOINT VENTURE

BY: /s/ John W. McMackin
JOHN W. MCMACKIN,
Managing Venturer

## APPENDIX O

MEMORANDUM

TO: Leroy Land

FROM: Charles R. Ackerman

SUBJ: Lake Forest Village – Loan Feasibility

DATE: November 14, 1980

I. Scope

This memo is to review and analyze the request for two loans in the Lake Forest Village Development; as you know, this is a 73 ± acre tract lying entirely with-in the confines of Trophy Club, which property was sold to Mr. John McMackin at the time of the dissolution of the Trophy Club PPA with Mssrs. Hogan – McMackin and Johnson – Loggins.

Proceeds from the two loans will be used to retire an existing raw land loan, to complete the development of Sections III, IV, and V, and provide funds for sales cost, and interest for these sections.

II. Proposes Loans

A. Collateral Loan

| | |
|---|---|
| $ 546,000 | Proposed Loan Amount (77.5% of appraisal, 100% of note balance) |
| $ 704,500✓ | Appraisal Value (Hagood and Associates – Oct. 7, 1980) |
| $ 546,170 | Current note balances (77.5% of appraisal) |
| Collateral | 28 completed lots in Sections I and II sold & under contract. |
| Use of Funds | See summary below. |

B. Development Loan

| | |
|---|---|
| $2,782,400 | Proposed Loan Amount (80% of appraised value) |
| $3,478,000✓ | Appraisal Value (Hagood & Assoc. – Oct. 22, 1980) |
| Collateral | 150 existing or to be developed single family lots plus 5.3 acres of raw land for future high density use. |
| Use of Funds | See summary below. |

C. Summary

1) Debt & Source of Funds

| | |
|---|---|
| $2,091,190 | Existing total debt, Loan 6331 |
| - 546,000 | Funds generated from collateral loan |
| -2,782,400 | Funds generated from new development loans. |
| ($1,237,210) | New Funds |

2) Use of Funds

| | |
|---|---|
| $1,237,210 | New funds available |
| - 72,442 | Complete Sect. III Development |
| - 188,251 | Complete Sect. IV Development |
| - 502,000 | Complete Sect. V Development |
| - 220,000 | Interest to GSA |
| - 70,000 | G&A Expenses |
| - 80,000 | Sales Expenses |
| $ 104,517 | "Excess Funds" |

III. Background Data

The Lake Forest Village development os [sic] a 70 acre tract which was sold to John McMackin at the dissolution of the original PPA.

The 73 acres acquired by McMackin are high value acreage, which has been systematically developed by Lake Forest in the same manner and under the same restrictions as the Trophy Club. The development and sales program is summarized belwo [sic].

| Sect. | Acreage | # Lots | # Sold | # Unsold | Remarks |
|---|---|---|---|---|---|
| I | 14.171 | 43 | 40 | 3 | Fully developed. |
| II | 14.844 | 35 | 34 | 1 | Fully developed. |
| III | 18.145 | 50 | 6 | 44 | 95% developed. |
| IV | 8.774 | 29 | 0 | 29 | 75% developed. |
| *V | 14.52 | 76 | 0 | 76 | Dev. not started. |
| Raw Land | 5.3 | ___ | ___ | ___ | For future hi-density |
| | 75.754 | | 80 | 150 | |

* In order to develop Sect. V under the current land plan, it will be necessary to for Trophy Club abd [sic] Lake Forest Village to agree on the exchange and sale of 1.8 acres of land which lies around the existing Amenity Center.

IV. Summary & Recommendations

Based on the performance of the developer to date, and the high sensitive nature of this property as it affects the future development of Trophy Club, I recommend this loan be made.

It will be subject to stringent controls with respect to Architectural Control and plat approval since the property is highly visible at the main entrance to Trophy Club.

CRA/jc/2.4.1

cc: Mike Barsi
Phil Barber
Milton Cowden

Enclosures

## APPENDIX P

MEMORANDUM

TO: E. Michael Lallinger

FROM: Charles R. Ackerman

SUBJ: Lake Forest Village – (John McMackin Loan)

DATE: February 9, 1981

Following a meeting with Mr. McMackin last Thursday, Feb. 5, the following points are presented as recommended cahnges [sic] in the extension of this Loan Agreement.

| | |
|---|---|
| $3,328,400 | Total Loan Amount:<br>Consists of $546,000 Collateral loan & $2,782,400 Development Loan. |
| -2,125,337 | To extinguish present loan. |
| $1,203,063 | New Money |

Interest Rate: 1½% above FHLB highest Category III money, floor of 12%, ceiling of 18%. Interest paid quarterly.

Term: Loan matures on October 10, 1982. Any extension will be solely at Gibraltar's option.

Liability: John McMackin is 100% liable for loan balance.

Releases: Same as prior; 100% of net sales receipts or 110% of appraisal, whichever is greater.

Further Obligation: Gibraltar shall have no further obligations to make future loans, nor does

Gibraltar have the obligation to make interim or permanent loans on lots covered by this agreement.

CRA/jc/1.2

cc: Leroy Land

---

## APPENDIX Q

GIBRALTAR SAVINGS ASSOCIATION
SENIOR LOAN
COMMITTEE ACTION

Borrower Lake Forest Developments Net Worth $____

_____ Net Worth $____

Guarantor (s) John McMackin Net Worth $____

_____

Does GSA have a Master File on the applicants? (X) No ( ) Yes

Lates Financial Statements dated: _____

Credit and financial information: ( ) Attached ( ) In Master File/Dated _____

Purpose: ( ) Acquisition ( ) Development (X) Refinance new money $1,203,063.

( ) Loan Extension

Security: 150 lots, 5.3 acre tract, and 28 collateral Notes, Lake Forest Village.

Location: Trophy Club Addition, Denton County, Texas

Appraised by: Hagood & Associates, Inc. As of 10-7-80; 10-22-80
$704,500 – Collateral Notes

Appraised Value $3,478,000 – 150 Lots & 5.3 Ac.
Loan ratio to value 80 %

Loan Amount: ~~$3,328,400.00~~ 3,319,300.00 Rate * _____

Fees 1% Term Mat. 10-10-82

This loan is subject to the following special requirements:

(x) Detailed narrative attached Memorandum dated 11-14-80-See further obligations 2/9/81MG

*1. 1½% above FHLB Rate Highest Cat. III – Floor 12% – Ceiling 18% – Interest paid Quarterl [sic]

2. Full Guaranty of John McMackin.

3. Releases: 100% of net sales receipts or 110% of appraisal, whichever is greater.

4. Renews and extends Loan #6331.

5. Loan amount on collateral notes not to exceed loan balance or 80% of appraisal, whichever is less.

✓ 6. Subject to current financial statements on Lake Forest Development and John McMackin.

Region: Houston (X) Approved ( ) Rejected

Date: 2-10-81

Loan Officer: James D. Hurst /s/ W. Leroy Land

/s/ Philip Barber

/s/ Illegible

Executive Committee Date: _____ /s/ Illegible

(2)

Supreme Court, U.S.
FILED
SEP 30 1993
OFFICE OF THE CLERK

No. 93-338

In The

# Supreme Court of the United States

October Term, 1993

LAKE FOREST DEVELOPMENTS,

*Petitioner,*

*vs.*

FIRST GIBRALTAR BANK, FSB,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether Lake Forest established the existence of an agreement complying with the mandates of *D'Oench, Duhme* which varied the terms of the written agreements between Lake Forest and Gibraltar Savings Association, the closed institution.

2. Whether Gibraltar Savings Association breached the written agreements with Lake Forest by seeking a personal guaranty from John W. McMackin.

3. Whether Lake Forest waived its claims asserted in this Court by failing to raise them in its pleadings below.

## LIST OF PARTIES

*Petitioner:*

Lake Forest Developments

*Respondent:*

First Madison Bank, FSB, f/k/a First Gibraltar Bank, FSB[1]

1. The Federal Savings and Loan Insurance Corporation was involved from the date of removal until August 9, 1989, the effective date of FIRREA. Thereafter, the Federal Deposit Insurance Corporation as Manager of Federal Savings and Loan Insurance Corporation Resolution Fund, as Receiver for Gibraltar Savings Association became involved as a party to the suit until Order for Summary Judgment was entered on March 26, 1991. No appeal was taken from this Order.

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## APPENDIX

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Appendix B — Order of the United States District Court for the Northern District of Texas, Fort Worth Division Filed March 26, 1991 ..... 13a

No. 93-338

In The

# Supreme Court of the United States

October Term, 1993

LAKE FOREST DEVELOPMENTS,

*Petitioner,*

*vs.*

FIRST GIBRALTAR BANK, FSB,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

Respondent, First Madison Bank, FSB, f/k/a First Gibraltar Bank, FSB ("First Gibraltar") respectfully files this Brief in Opposition to the Petition for Writ of Certiorari of Petitioner Lake Forest Developments ("Lake Forest") and would show as follows:

## STATEMENT OF CASE

On March 30, 1977, Gibraltar Savings Association ("GSA") entered into a loan agreement (the "Loan Agreement") with

Johnson-Loggins, Inc., to finance development of 74 acres of real property in Denton County, Texas for residential use. The Loan Agreement set forth Johnson-Loggins' obligations to submit a master development plan for GSA's approval, to be followed by more specific section plans and budgets for the parts of the property that were to be platted, showing detailed plans for streets, utility lines, etc. Section 2.02(a) of the Loan Agreement provided in part:

> [GSA] shall be obligated to furnish to [Johnson-Loggins] the amount of funds required to discharge and pay the costs of acquisitions and holding of the said property, to pay taxes, insurance and other specific direct costs of the development as set out in Section 3.04 hereinafter . . . [GSA] shall not be obligated to advance in excess of eighty percent (80%) of the appraised value of the subject property according to the appraisal submitted to and accepted by [GSA]. *[GSA] shall not accept a reappraisal at a later date in order to increase the amount of funds to be advanced hereunder.*

(emphasis added). The direct costs listed in Section 3.04 included, *inter alia* the cost of land, cost of improvements, property taxes, advertising and sales expenses, and recording and title fees. Section 5.01 provided that the debt was to be nonrecourse, with GSA looking for repayment solely to the property and other security provided. On the same day, Johnson-Loggins executed a $1.8 million promissory note to GSA reflecting advances that it was contemplated GSA would thereafter periodically make for expenses in developing the property. The note also reflected that the debt was nonrecourse, with GSA agreeing to look solely to the mortgage described in a deed of trust executed contemporaneously by Johnson-Loggins for repayment.

Several months later, the Loan Agreement was assigned to Lake Forest, a joint venture formed by John W. McMackin ("McMackin") and Robert West ("West") to develop and ultimately sell the property. In October, 1977, McMackin, on behalf of Lake Forest, submitted to GSA a plan and basic budget for the first phase of development of the property. The first phase included development of 22.2 acres. A November 7, 1977 GSA memorandum reflects GSA's assent to proceed based on the plan submitted by McMackin.

In January, 1979, McMackin submitted to GSA a plan and budget for the second phase of development. This plan included a request for additional funds based on a reappraisal of part of the property. A GSA memorandum dated January 11, 1979 discussing this proposal shows that the property is divided into three parcels, and that Parcel 1, on which it was originally contemplated that there would be 62 lots, had been reconfigured so that it would contain 106 lots. As a consequence of this changed land plan, a new appraisal of Parcel 1 had been performed, resulting in a new total appraised value for all three tracts of $3,015,591.00. The memorandum reflects that the "Loan Request at 80%" based on the new appraisal was $2,412,470.00, representing a request for new funds in the amount of $610,870.00. The plan, budget, and request were all approved by GSA.

On May 29, 1979, Lake Forest executed a promissory note to GSA in the amount of $2.96 million, renewing and extending the original $1.8 million loan. Like the previous note, this note reflected that it evidenced a nonrecourse debt and was accompanied by a deed of trust on the property.

In late 1980, Lake Forest sought further development funding that would have increased the total loan amount to approximately $3.3 million. A November 14, 1980 GSA memorandum summarizing the request shows the requested amount to be eighty

percent (80%) of the property value as calculated in an October, 1980 appraisal. A memorandum dated February 9, 1981 reflects that Ackerman had met with McMackin and was making the following recommendations (among others) for changes in the Loan Agreement when it was extended: (1) that McMackin would be 100% liable for the loan balance, and (2) that GSA would have no further obligation to make future loans. According to a GSA memo dated February 10, 1981, the GSA loan committee approved the refinancing on the conditions suggested by Ackerman, including personal liability by McMackin. McMackin submitted to the district court documents that he claims GSA demanded that he sign in order to receive the requested additional funding for Lake Forest. These documents included a full personal guaranty of the new loan and a termination of the March, 1977 loan agreements.

McMackin refused to sign these documents. On August 11, 1981, Lake Forest filed suit in Texas state court against GSA for breach of contract, seeking specific performance or damages. Lake Forest subsequently defaulted in its payments on the May, 1979 note, and GSA foreclosed and purchased the property at a trustee's sale on June 7, 1983. GSA also foreclosed upon and subsequently purchased, at two judicial sales, a total of twenty-seven promissory notes that Lake Forest had collaterally assigned to GSA as additional security. Lake Forest then amended its complaint to add claims for wrongful foreclosure.

On December 27, 1988, the Federal Home Loan Bank Board declared GSA insolvent and appointed the FSLIC as receiver. The following day, the FSLIC entered into an agreement with what was the First Texas Bank. First State Bank acquired certain GSA assets, including the property formerly owned by Lake Forest, and took the name First Gibraltar.

In January, 1989, the FSLIC intervened in Lake Forest's suit and removed it to federal court. On July 27, 1989, the district court granted Lake Forest's motion for leave to join First Gibraltar as a party necessary for adjudication of rights to the property.

On March 26, 1991, after substitution of the FDIC for the FSLIC as receiver for GSA, the district court entered an order granting the FDIC's and First Gibraltar's respective motions for summary judgment. On April 28, 1991, the Fifth Circuit Court of Appeals affirmed the district court's summary judgment. *See Lake Forest Developments v. FDTC,* 989 F.2d 197 (5th Cir. 1993). Following this, Lake Forest submitted its Petition for Writ of Certiorari.

## SUMMARY OF ARGUMENT

Lake Forest's Petition for a Writ of Certiorari should be denied for two reasons. First, the Court of Appeals' decision conflicts with neither the prior holdings of the Fifth Circuit nor the decisions of other United States Courts of Appeals. In fact, the Court of Appeals correctly affirmed the District Court's Summary Judgment because Petitioner's claims are barred under the *D'Oench, Duhme* doctrine.

In its Petition for Certiorari, Lake Forest now contends that the bilateral contract exception to the *D'Oench* doctrine allows its claims to proceed. In its pleadings, Lake Forest sought to void the foreclosure sale of certain Lake Forest-owned properties, asserting that GSA had no justifiable cause for initiating foreclosure, and that any default by Lake Forest was directly attributable to an alleged breach of the Loan Agreement by GSA. The alleged breach, however, is founded upon an alleged oral waiver of certain provisions contained in the Loan Agreement. Thus, Lake Forest's claims run afoul of *D'Oench* because Lake Forest sought the benefit of a secret agreement which contradicted the express terms

of the Loan Agreement. In essence, Lake Forest sought to invalidate a facially valid instrument. Clearly, Lake Forest, by relying on the alleged oral waiver, lent itself to a scheme likely to mislead banking authorities. As such, Lake Forest's claims are barred by the *D'Oench, Duhme* doctrine and 12 U.S.C. § 1823(e).

By purchasing the asset at issue from FSLIC, as receiver for GSA, First Gibraltar acquired the protections afforded FSLIC under federal law. Although Lake Forest contends that the bilateral obligation exception to the *D'Oench* doctrine allows its claim to proceed, clear case law requires that Lake Forest's claim be barred.

Second, Petitioner has waived the claims made in its Petition for a Writ of Certiorari. Having lost on the claims it pleaded in the District Court, Petitioner now seeks a writ of certiorari based upon a new theory not advanced in its pleadings in the District Court or in the Court of Appeals. Because these new theories have been waived, this Court should deny the Petition for Writ of Certiorari.

## REASONS FOR DENYING THE WRIT

### I.

### THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH EITHER THE PRIOR HOLDINGS OF THE FIFTH CIRCUIT OR THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

The Fifth Circuit correctly affirmed the District Court based on the *D'Oench, Duhme* doctrine. Lake Forest's own pleadings establish that its claims were based on an alleged *oral* waiver of a written agreement. More specifically, Lake Forest alleged:

> GIBRALTAR I has waived and is estopped from relying on the provision of the March 30,

> 1977, Loan Agreement that it was not obligated to accept reappraisals based upon the words and actions of its agents who had actual or apparent authority to bind GIBRALTAR I.

*See* Appendix A, page 6a at ¶ 17.[2] Before this Court, Lake Forest takes the curious and highly unusual position that its pleadings are "irrelevant." More specifically, Lake Forest states:

> [a]fter discovery when it became clear that evidence of the [alleged] breaches of the loan agreement had been reduced to writing and were contained in the records of GSA, *the allegations of oral waiver became irrelevant* and were not pursued by Lake Forest.

Petition for Writ of Certiorari at p. 14 (emphasis added).

Lake Forest seeks to abandon its pleadings only because there are no grounds for issuance of a writ of certiorari based on the pleadings, evidence and arguments submitted to the Courts below. Thus, Lake Forest seeks to manufacture a conflict between the Court of Appeals' decision in this case and (1) the Fifth Circuit's prior decisions and (2) the decisions of other Courts of Appeals.

In this Court, Petitioner argues that the bilateral contract exception to *D'Oench is* applicable in this case. Because there was no breach of a bilateral contract, the Fifth Circuit's decision does not conflict with its prior decisions or other decisions of Courts of Appeals. Petitioner confuses written documents reflecting discussions of a potential loan modification which was never memorialized in a written, executed agreement, with an executed agreement contained in the books and records of a failed financial

---

2. Petitioner did not include its Fourth Amended Original Petition among the documents included in its Appendix to its Petition for a Writ of Certiorari.

institution. In other words, there can be no bilateral contract exception until there is an executed, written contract.

In *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), the United States Supreme Court articulated a policy designed to preclude claims not appearing on the face of the records of a savings and loan or bank placed in receivership. In *D'Oench, Duhme*, this Court held that secret agreements designed to deceive the banking authorities, or that would tend to have that effect, may not be asserted as a defense against the FDIC suing in its corporate capacity. The underlying rationale of the rule is that banking authorities are entitled to rely on the books and records of a financial institution. Thus, a person who, to accommodate a bank, executes an instrument which is in the form of a binding obligation, is estopped from arguing that the parties agreed that the instrument would not be enforced. *D'Oench, Duhme*, 315 U.S. at 461; *FSLIC v. Wilson*, 722 F. Supp. 306, 312 (N.D. Tex. 1989).

*D'Oench, Duhme* and its progeny have since been extended far beyond the situation in which the lender and borrower secretly agree that an obligation will not be enforced. Moreover, Congress enacted Section 1823(e) of Title 12 which provides:

> [N]o agreement which tends to defeat the interest of the Corporation and any asset acquired by it under this section or section 1821 of this title, either as security for a loan of by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution, (3) was

> approved by the Board of Directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee and (4) has been, continuously, from the time of its execution, an official record of the depository institution.

This Court construed § 1823(e) expansively in *Langley v. FDIC*, 484 U.S. 86, 108 S. Ct. 396, 98 L. Ed 340 (1987). In *Langley*, the Langleys alleged that the insolvent bank had misrepresented certain existing facts upon which they relied in executing the note that was the subject of the lawsuit; however, no reference to the alleged representations appeared in the records of the failed bank. The Court held that under § 1823(e), a borrower who signs a facially unqualified note subject to unwritten conditions or understandings "has lent himself to a scheme or arrangement whereby the banking authority ... was likely to be mislead, whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme)*, or of the truthfulness of a warranted fact." *Id.* at 90; *accord Buchanan v. FSLIC*, 935 F.2d 83, 86 (5th Cir.), *cert. denied sub. nom. Buchanan v. First Gibraltar Bank, FSB*, __ U.S.__, 112 S. Ct. 639, 116 L. Ed. 2d 657 (1991). Accordingly, in *Langley*, the Court rejected the Langleys' claims and found them liable on the note.

As noted by the Fifth Circuit, the aims of both § 1823(e) and *D'Oench, Duhme* are identical, and the reasoning applied in § 1823(e) cases is applicable to *D'Oench, Duhme* cases. *Olney Savings & Loan Ass'n. v. Trinity Banc Savings* Ass'n., 885 F.2d 266, 274 (5th Cir. 1989). The Fifth Circuit has also extended the protections of *D'Oench, Duhme* to private parties, such as First Gibraltar, that purchase the assets of a failed institution from the FDIC (or formerly, the FSLIC). *Porras v. Petroplex Savings Ass'n.*, 903 F.2d 379, 381 (5th Cir. 1990). Thus, the policies and

protections arising from § 1823(e) and *D'Oench, Duhme* are applicable to this case.

In its petition Lake Forest asserts that the application of § 1823(e) and *D'Oench* to the case at hand is incorrect. Lake Forest further declares that the Fifth Circuit committed error when it "substantially departed from the accepted and usual course of judicial proceedings" by applying the *D'Oench* to the matter in issue. In particular, Lake Forest believes the Fifth Circuit's holding conflicts with prior decisions of both the Fifth Circuit, and other, circuit courts of appeal. This belief is incorrect.

As a predicate to its assertion of error, Lake Forest relies on the bilateral obligation exception to the *D'Oench* delineated in *Howell v. Continental Credit Corp.*, 655 F.2d 743 (7th Cir. 1981). *Howell* found an exception to *D'Oench* "where the document the FDIC seeks to enforce is one . . . which facially manifests bilateral obligations and serves as the basis of the [obligor's] defense." *Howell,* 655 F.2d at 746. Lake Forest contends that its action for wrongful foreclosure properly fell under the Howell exception and that the Fifth Circuit, in making its ruling, ignored the asserted exception.

It is unclear why Lake Forest feels the Fifth Circuit should have applied the Howell exception in this instance. GSA breached no "bilateral obligation" apparent from the face of the Loan Agreement. First Gibraltar grants that, based partially on reappraisals of the property in question, GSA did increase the amount of the note. However, this method of dealing practiced between GSA and Lake Forest was *never* memorialized by anything even remotely resembling an "agreement" as contemplated by either D'Oench or §1823(e). To the contrary, Lake Forest's own pleadings acknowledge that the Loan Agreement stated that GSA "did not have to make any increased loan on the basis of reappraisals." Plaintiff's Fourth Amended Complaint at Paragraph 11, Appendix "A" hereto at 4a.

There is not, and never was, any agreement requiring GSA to increase the loan based on reappraisals. Nevertheless, Lake Forest attempts to create such an agreement by relying on the existence of a few internal GSA Memoranda which contemplate possible loan increases ostensibly based on reappraisals. Lake Forest's attempted creation falls far short of both case law and statutory requirements for an agreement.

Thus, in its opinion below, the Fifth Circuit correctly observed, "[t]here is no claim (or evidence) of any written waiver or agreement to accept such a reappraisal." 989 F.2d at 201 n.1. Surely, had there been such a *written* waiver or modification *agreement,* Petitioner would have included the "Agreement" in its pleadings and in the Appendix to its Petition for a Writ of Certiorari.[3]

The Fifth Circuit in *FDIC v. Hamilton,* 939 F.2d 1225 (5th Cir. 1991) directly addressed the contentions Lake Forest makes in the present petition. *Hamilton* involved the FDIC's suit for collection on a note where the note's maker asserted a right to offset based on certain internal bank memos and bank minutes memorializing the bank's "obligations" concerning the timely financing of the loan. The alleged obligations were not contained in the agreement covering the loan. Ruling in the FDIC's favor, the Court first recognized the *Howell* bilateral obligation exception, then went on to hold that "[t]he Hamiltons, however, cannot avail themselves of this exception because the note upon which the Hamiltons base their claim does not facially manifest [the closed institutions] bilateral obligation." *Hamilton,* 939 F.2d at 1231. Despite the

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3. Petitioner's assertion that its own pleadings were outdated and did not reflect the state of discovery are unavailing in light of the absence of any motion to amend its Fourth Amended Original Petition. In fact, any effort by Petitioners to amend their pleadings to specifically delineate the existence of documents which did not rise to the level of an executed agreement would not have satisfied the requirements of the bilateral contract exception.

existence of documents purporting to evidence a course of dealing different than that contemplated by the Loan Agreement, the debtor's claims failed. Clearly memoranda do not an agreement make. Here, Lake Forest's artful compilation of documents, as with the Hamiltons previous, cannot create a breach of an agreement to increase the loan based on reappraisals when, in fact, no agreement ever existed. Lake Forest concedes as much in its own Petition by stating "To refuse to fund because of a concurrent refusal to accept a reappraisal under § 2.02 was a right that GSA clearly had under the Loan Agreement." Lake Forest's Petition for Writ of Certiorari, page 13. It is hard to imagine how GSA's exercising a right clearly provided for translates into a defense against enforcement of the note.

A decision similar to that in *Hamilton* was reached by the Sixth Circuit in *Hall v. FDIC,* 920 F.2d 334 (6th Cir. 1990), *cert. denied,* __U.S. __, 111 S. Ct. 2852, 115 L. Ed. 2d 1020 (1991). The borrowers in *Hall* sued the FDIC for breach of a Loan Agreement. The borrowers claimed that a letter agreement executed between the closed institution (whose assets the FDIC acquired) and another bank worked to relieve the borrowers of the requirement that the borrowers grant to the bank a first lien on certain property. The letter agreement was never incorporated into the original Loan Agreement, thus prompting the court to rule, "[T]he side agreement that the plaintiffs rely on is precisely the type of secret agreement barred by the Supreme Court in *D'Oench*. . . . Where a failed bank or thrift has breached a *written term of a Loan Agreement,* the obligor may, of course, sue the FDIC as receiver without the bar of the *D'Oench* doctrine. But where, as here, the breach asserted depends on a *side agreement that conflicts with the terms of the written Loan Agreement, a breach of contract claim cannot be sustained.*" *Hall,* 920 F.2d at 340-341 (emphasis added). The borrowers in Hall, actual agreement favoring their claim in hand, failed on their suit against the FDIC. Lake Forest presented even less, yet expected the Fifth Circuit to endorse their action.

Lake Forest cites the Fifth Circuit case of *FSLIC v. Mackie,* 962 F.2d 1144 (5th Cir. 1992) as support for its assertion of error committed. Lake Forest claims that the Fifth Circuit's holding in the case at hand conflicted with prior holdings of the court. In *Mackie,* the borrower made claims similar to those made by Lake Forest, namely that a breach of a fiduciary duty (*i.e.,* bilateral obligation) afforded a defense to enforcement of the note. The Fifth Circuit remanded the case for further fact finding and made no ruling as to the breach. In remanding, the Fifth Circuit *did* foreshadow its reasoning for the soon to come denial of Lake Forest's claim — "[Mackie] can, however, assert defenses that are based on obligations contained in the written Loan Agreement, *as long as he does not rely on any unrecorded agreements to support his allegations.*" *Mackie,* 962 F.2d at 1151 (emphasis added); *see also, Langley,* 484 U.S. 86, 108 S. Ct. 396, 98 L. Ed. 340 (1987). As previously pointed out by both Petitioners and Respondents, the written agreement contains no obligation requiring GSA to increase the loan based on reappraisals. Furthermore, Lake Forest has *no* agreement to support its allegations, much less an unrecorded one. The Fifth Circuit was correct in following the clear reasoning contained in one of its own decisions.

Under statutory analysis, Lake Forest's claims of breach and error fall even further a field. Cursory examination of the "agreement" on which Lake Forest bases its claims of breach reveals that the documents fail to meet two, and most likely three, of the necessities of § 1823(e). First, the memoranda relied on are all dated after the creation of the Loan Agreement and thus were not executed by both parties contemporaneously with the acquisition of the note. Second, the memoranda, since their is no "date of execution", by definition could not continuously be an official record of GSA. Third, although there is a single document bearing the signatures of GSA's executive committee, the document is, at most, an offer to renegotiate the loan and not, in any sense of the word, an agreement approved by GSA's loan

committee. The memoranda were written but, according to § 1823(e), this hardly amounts to an agreement that GSA could breach. With their decision in *Langley,* The Supreme Court concisely addressed the results of not meeting § 1823(e)'s requirements: "The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e). An agreement that meets them prevails . . ., and an agreement that does not meet them fails . . . . It would be rewriting the statute to hold otherwise. " *Langley,* 484 U.S. at 95, 108 S. Ct. at 403 . Accordingly, the Fifth Circuit was correct in its determination that Lake Forest's claim of "breach" was without merit.

Viewing the situation in light most favorable to Lake Forest, the actions GSA took amounted to a waiver of the relevant loan provision. This waiver was never incorporated into the Loan Agreement. *D'Oench* (along with § 1823 (e)) stands for the proposition that, in order to protect the FDIC from "misrepresentations as to the . . . assets in the portfolios of banks which [FDIC] insures," secret agreements that tend to deceive banking authorities cannot be raised as a defense against the FDIC when it seeks to enforce a note. *D'Oench,* 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942). The "agreement" Lake Forest attempted to raise as a defense is one that would deceive banking authorities and, as such, was correctly barred as a basis for defending against the note's enforcement. Even assuming that Lake Forest could establish the existence of a "bilateral contract", the claims asserted by Lake Forest do not run against First Gibraltar. The summary judgment evidence established that First Gibraltar did not assume unsecured obligations of GSA. Additionally, the summary judgment evidence submitted by the FDIC established that GSA's receiver had no assets from which a judgment could be satisfied. *See* Order granting FDIC's Motion for Summary Judgment, Appendix "B" hereto at 13a. The Fifth Circuit has consistently held that unsecured claims, which have been determined "worthless" in connection with the closing of the failed institution, cannot be

revived and asserted against the acquiring institution. *See, e.g., First Indiana, FSB v. FDIC,* 964 F.2d 503, 506-7 (5th Cir. 1992); *Santopadre v. Pelican Homestead & Savings Assn.,* 937 F.2d 268, 272 (5th Cir. 1991). Instead, the claims are relegated to payment, if any,[4] by the receiver *after* general depositors, pursuant to Texas depositor preference statute. *First Indiana,* 964 F.2d at 506; *Gulley v. Sunbelt Savings, F.S.B.,* 902 F.2d 348, 351 (5th Cir. 1990), *cert. denied,* 498 U.S. 1025, 111 S. Ct. 673, 112 L. Ed. 2d 665 (1991). These cases moot Lake Forest's contention that it is entitled to pursue its claims under the bilateral contract doctrine. *Mackie* and *RTC v. Oaks Apartment Joint Venture,* 966 F.2d 995 (5th Cir. 1992) both involved claims against the *receiver* under a bilateral contract. In short, the bilateral contract exception is of little consequence because whatever claims Lake Forest may have: (1) can only be asserted against GSA's receiver; and (2) are worthless.

Lake Forest, perhaps realizing the futility of its claim of breach based on the reappraisal issue, also contends that GSA breached the Loan Agreement when, in an offer to create a new loan, GSA requested that the new loan contain a personal guarantee from John McMackin (a participant in the Lake Forest joint venture). § 5.01 of the Loan Agreement reads: "Liability. The monetary obligation of Owner [Lake Forest] shall be non-recourse with Owner assuming no liability for repayment. [GSA] agrees to look exclusively to the security for repayment of such monetary obligations." Lake Forest's Petition for Writ, Appendix G, page App. 32. GSA never looked beyond the security for *repayment* of the note. GSA *did* seek a personal guarantee in connection with negotiating a new note, but requesting personal liability for a potential loan modification does not constitute a breach of the existing Loan Agreement. If GSA had looked to McMackin for repayment of funds previously advanced, Lake Forest's claim of

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4. Because unsecured claims against GSA were determined worthless, Lake Forest has no claim against the receiver.

breach would hold more weight. As it is, Lake Forest's complaint amounts to nothing more than dislike of GSA's negotiating position;[5] requesting a personal guaranty is not looking to the maker for repayment under a note. Additionally, requiring partners to guarantee a nonrecourse partnership debt does not conflict with a note's provisions that it is nonrecourse. *See FDTC v. Singh,* 977 F.2d 18, 22-3 (lst Cir. 1992); *RTC v. Northpark Joint Venture,* 958 F.2d 1313, 1320-1 (5th Cir. 1992), *cert denied, Dannis v. RTC,* __ U.S. __, 113 S. Ct. 963, 112 L. Ed. 2d 120 (1993). No degree of tortured provision-reading or mischaracterization of events can manufacture a breach where none exists. Simply put, GSA did nothing wrong, and certainly nothing in contravention of the agreement such that the Fifth Circuit needed rule in Lake Forest's favor.

## II.

## LAKE FOREST FAILED TO PLEAD THE CLAIMS ON WHICH IT SOUGHT RELIEF, AND THEREFORE, HAS WAIVED SUCH CLAIMS.

A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. *Standard Oil Co. v. State of Missouri,* 224 U.S. 270, 34 S. Ct. 406, 56 L. Ed. 760; *Reynolds v. Stockton,* 140 U.S. 254, 11 S. Ct. 773, 35 L. Ed. 464; *Sylvan Beach v. Roch,* 140 F.2d. 852 (8th Cir. 1944). In deciding the case at hand the Fifth Circuit held correctly that the District Court's summary judgment was proper. Both the pleadings and the evidence supported the District Court's ruling. The heart of Lake Forest's Fourth Amended Petition, its

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5. Thus, the memoranda in Petitioner's Appendix coupled with Petitioner's allegations make clear there was no meeting of the minds concerning the alleged oral modification. Accordingly, there was no *agreement* to which the bilateral contract exception could apply.

final pleading, alleged that GSA had failed and refused to advance adequate funds based upon acceptable reappraisals and, that based upon the words and actions of GSA's agents, GSA had waived and was estopped from relying on the provision of the Loan Agreement stating that GSA was not obligated to accept reappraisals. *See* Lake Forest's Fourth Amended Original Petition, paragraphs 16 and 17, Appendix "A" hereto at 6a. No mention was made of Lake Forest's belief in the existence of a written "agreement" evidencing GSA's obligation to fund based on reappraisals. Also, the petition failed completely to reference the alleged breach of the Loan Agreement provision precluding personal liability. Lake Forest's Petition for Writ states: "After discovery when it became clear that evidence of the breaches of the Loan Agreement had been reduced to writing and were contained in the records of GSA the allegations of oral waiver became irrelevant and were not pursued by Lake Forest." Lake Forest's Petition for Writ, page 14. First Gibraltar, in addition to disputing the breaches, asks the question: If Lake Forest believed it had new evidence and new claims and was thus dropping its pursuit of the alleged oral waiver, why did it not amend its pleadings to reflect these new beliefs and claims? Speaking on pleadings, the Eighth Circuit states: "A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved. The foregoing rules are all fundamental and state nothing more than the essentials of due process and fair play. . .. They cannot be circumvented by allowing amendments to pleadings to change a cause of action after judgment. . . ." *Sylvan Beach,* 140 F.2d at 862. Lake Forest pleaded a claim for relief based on an oral waiver. The courts below correctly held that both *D'Oench* and § 1823(e) barred this claim. Thus, the Petition for Certiorari should be denied.

## CONCLUSION

At its simplest, Lake Forest is attempting to avoid the effect of an instrument, valid on its face, by alleging a breach of certain side agreements which contradict the express terms of the instrument, and by alleging breach of the instrument itself. Lake Forest can only void First Gibraltar's note by presenting proper evidence proving the validity of these side agreements, and by presenting proper evidence proving a breach of the actual instrument occurred. Lake Forest has done neither. First Gibraltar, as transferee from the FSLIC, is entitled to the protections afforded by *D'Oench* and § 1823(e). As such, Lake Forest's claims must fail, and the Court's opinion below was in all things correct.

Respectfully submitted,

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## APPENDIX A — PLAINTIFF'S FOURTH AMENDED ORIGINAL PETITION FILED JULY 27, 1989

In The United States District Court
for the Northern District of Texas
Fort Worth Division

Civil Action No.
CA 4-89-00094K

Judge David O. Belew, Jr.

Lake Forest Developments,

Plaintiff,

vs.

The Federal Savings and Loan Insurance Corporation as Receiver for Gibraltar Savings Assocation, Houston, Texas; David Osborne, Trustee; and First Gibraltar Bank FSB, Houston, Texas,

Defendants.

PLAINTIFF'S FOURTH AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES LAKE FOREST DEVELOPMENTS, Plaintiff in the above-numbered and entitled cause, complaining of GIBRALTAR SAVINGS ASSOCIATION (Gibraltar I) and FIRST GIBRALTAR BANK, FSB (Gibraltar II), and for cause of action would respectfully show:

*Appendix A*

*PARTIES*

1. Plaintiff, LAKE FOREST DEVELOPMENTS, is a joint venture organized under Texas law with all venturers, John W. McMackin and Robert G. West, residing and being domiciled in Tarrant County, Texas.

2. Defendant GIBRALTAR SAVINGS ASSOCIATION (Gibraltar I) is a Texas savings and loan association with a regional office in Fort Worth, Tarrant County, Texas, and has already been served with process and has filed an answer in this proceeding.

3. Defendant FIRST GIBRALTAR BANK is a federal stock savings bank organized under the laws of the United States whose address is 13401 North Freeway, Houston, Harris County, Texas 77060, where service of process may be obtained.

4. Defendant FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION ("FSLIC") has appeared in this action as *Receiver* for GIBRALTAR SAVINGS ASSOCIATION (Gibraltar I), removing this action from the Tarrant County District Court.

5. This suit is filed pursuant to the provisons of TEX. BUS. COM. CODE ANN. § 17.41 et. seq., commonly known as the Deceptive Trade Practices and Consumer Protection Act and hereinafter referred to as the DTPA, upon the grounds that the acts and practices described herein are prohibited by this statute. Plaintiff is a "consumer" as that term is defined in the DTPA. Defendant, GIBRALTAR SAVINGS ASSOCIATION (GIBRALTAR I), was the seller and/or provider of services to Plaintiff, LAKE FOREST DEVELOPMENTS, consisting of but not limited to the lending of money and provision of real estate

counseling and expertise in connection with Plaintiff's acquisition and development of approximately seventy-five (75) acres in the Trophy Club subdivision.

*FACTS*

6. Prior to March, 1977, the predecessor of the Plaintiff was the Trophy Club Joint Venture, in which John W. McMackin, Ben Hogan, and Johnson-Loggins, Inc., were participants. Defendant GIBRALTAR I advanced funds for development of the Trophy Club Joint Venture under a profit participation agreement executed in June, 1973. In 1977, at the request and insistence of GIBRALTAR I, the Trophy Club Joint Venture was dissolved, with Johnson-Loggins withdrawing and GIBRALTAR assuming control of and ownership of the property and project, with the exception of 75 acres deeded to Hogan and McMackin. Hogan and McMackin also retained a one-third (1/3) net profit interest in the Trophy Club.

7. Because of the change of the joint venture, the participants (including McMackin) would have been liable for the federal income tax consequences of a recapture of losses taken in previous years and lost years of valuable effort. In consideration of this consequence, GIBRALTAR I agreed to sell approximately 75 acres to the individual participants and finance future development of the whole property, with GIBRALTAR I having control and veto over the development. GIBRALTAR I also provided interim and permanent financing to the customers of the joint venture. The successor joint venture is LAKE FOREST DEVELOPMENTS, the Plaintiff, and McMackin is a 95% participant in the joint venture.

8. On March 30, 1977, Defendant GIBRALTAR I entered

into an agreement to provide all development funds to Johnson-Loggins, Inc. This right was assigned to Plaintiff. On March 30, 1977, Johnson-Loggins executed a $1,800,000 note to GIBRALTAR I. This non-recourse note was assumed by Plaintiff. At the time, Plaintiff had submitted no development plan or budget to GIBRALTAR I pursuant to the terms of the March 30, 1977, Loan Agreement.

9. In October, 1977, Hogan asked to withdraw from the Trophy Club project. GIBRALTAR I and McMackin consented and it was agreed that McMackin would withdraw from his right to the net profits and actually develop the 75 acres which had been deeded to him on March 30, 1977. GIBRALTAR I agreed to advance development funds under the terms of that agreement.

10. Because McMackin was not experienced in land development he hired Norman Tobleman to manage the project. Budgets were prepared for a partial development of the 75 acres. This was submitted under the Loan Agreement of March 30, 1977. Because only a partial budget and development plan was submitted, McMackin needed to be assured he could request further development funds for those portions of the land not covered by the initial budget.

11. The Loan Agreement of March 30, 1977, stated that GIBRALTAR I did not have to make any increased loan on the basis of reappraisals. No appraisals or budgets were submitted for the $1,800,000 note. Appraisals were submitted in November of 1978 and March of 1979 on the basis of which the loan note was increased to $2,960,000 on May 29, 1979.

12. In February, 1978, Charles Ackerman, Vice President of GIBRALTAR I, acting in the scope and course of his employment,

represented to McMackin and Tobleman that GIBRALTAR I would not refuse to issue commitments to advance development funds based upon reappraisals if LAKE FOREST was in fact developing the property pursuant to the Loan Agreement and terms set by GIBRALTAR I. McMackin relied upon this assurance in proceeding to develop the property in phases.

13. In March, 1979, Wiley Wisely, Executive Vice President of GIBRALTAR I, acting in the scope and course of his employment, represented to McMackin and Tobleman that GIBRALTAR I would not refuse to make development loans based upon reappraisals if LAKE FOREST was developing the land pursuant to the Loan Agreement. McMackin relied upon this assurance and presented the second phase of partial development of the 75 acres.

14. Plaintiff, pursuant to the agreement, on or about May 29, 1979, executed a note to GIBRALTAR I in the principal amount of $2,960,000. The Plaintiff also executed a deed of trust, which was subsequently recorded in Volume 529, Page 919, Deed of Trust Records, Denton County, Texas, covering the development property for the benefit of GIBRALTAR I in order to secure payment of the $2,960,000 note. Plaintiff, pursuant to the terms of the agreement, continued to satisfactorily develop the property.

15. In the fall of 1980, Plaintiff again requested that Defendant GIBRALTAR advance further development funds pursuant to the terms of the loan agreement between the parties based upon an acceptable reappraisal of such property. Ackerman recommended that this increase in the available development funds be approved by GIBRALTAR I. These funds would have completed the development of the 75 acres. It was the obligation of GIBRALTAR I to advance development funds to complete the project.

*Appendix A*

16. Defendant GIBRALTAR I has failed and refused and continues to fail and refuse to advance adequate development funds based upon acceptable reappraisals, or on any basis, for the development of the property in accordance with the March 30, 1977, Loan Agreement. Such failure and refusal on the part of Defendant GIBRALTAR I to advance such funds constitutes a breach of the agreement between the parties.

17. GIBRALTAR I has waived and is estopped from relying on the provision of the March 30, 1977, Loan Agreement that it was not obligated to accept reappraisals based upon the words and actions of its agents who had actual or apparent authority to bind GIBRALTAR I.

18. On August 11, 1981, Plaintiff filed suit in the District Court of Tarrant County, 17 Judicial District, alleging breach of contract by Defendant GIBRALTAR I.

19. Because of the uncertain quantity and difficulty in proof of damages, Plaintiff sought specific enforcement of the agreement between Plaintiff and Defendant GIBRALTAR I. (See Plaintiff's Original Petition.)

20. In the alternative, Plaintiff sought damages in an amount of approximately $1,250,000 for its inability to continue proper development of the property, for the tax consequences thereof, and for loss of profits. (See Plaintiff's Original Petition)

*Count I*

21. By letter dated May 23, 1983, from the attorneys for GIBRALTAR I, Plaintiff was notified that GIBRALTAR I intended to foreclose and sell at public sale on June 2, 1983, a total of 21

certain promissory notes belonging to Plaintiff. Such notes had been collaterally assigned to GIBRALTAR I to additionally secure GIBRALTAR I with respect to funds advanced for development of the property. Included with the letter from GIBRALTAR I was a copy of a notice which was apparently posted at the Denton County Courthouse, and a copy of which notice is attached as Exhibit A to this petition and made a part hereof for all purposes.

22. By letter dated May 27, 1983, counsel for the Plaintiff objected to the notice attached as Exhibit A in that the notice failed to adequately describe the notes to be sold, their principal amount, the interest rate, the Maker, and remaining period of time to be paid. In addition the notice stated that the notes would be sold at the public sale in bulk to the highest bidder for cash. By the terms of the May 27, 1983, letter from counsel for the Plaintiff the Defendant was made aware of the numerous defects in the notice of the sale and was urged not to hold the sale at least until an adequate notice of the sale was prepared and posted, but GIBRALTAR I failed to correct any of such deficiencies. A copy of said letter dated May 27, 1983, is attached as Exhibit B to this petition and made a part hereof for all purposes.

23. On June 2, 1983, GIBRALTAR I held a sale at the courthouse door in Denton County, Texas, and entertained bids for the 21 promissory notes. A representative for Plaintiff was present for the sale and again requested that GIBRALTAR I not conduct the sale, but GIBRALTAR I refused to postpone or cancel the sale. GIBRALTAR I was the only party bidding at such sale and was thus the successful bidder for the notes. GIBRALTAR I indicated that it intended to contact the makers of such notes and request future payments be made directly to GIBRALTAR I.

24. Plaintiff would request the Court to set aside the sale of

the 21 promissory notes held on June 2, 1983, and decree such sale void for the reason that GIBRALTAR I failed to give proper notice of such proposed sale. In addition, any default of the Plaintiff under the terms of its development loan note to GIBRALTAR I is directly attributable to the breach of GIBRALTAR I under the terms of the loan agreement. As a result GIBRALTAR I was without authority to initiate foreclosure proceedings on such notes and GIBRALTAR I's actions in conducting the sale and receiving direct payments on the notes has damaged the Plaintiff. LAKE FOREST would request the Court to set aside such sale, restore the title of notes to LAKE FOREST DEVELOPMENTS, and require an accounting from GIBRALTAR I for any funds received by it on such notes.

*Count II*

25. Plaintiff repeats and realleges the allegations set forth in paragraphs 5-23 hereof as if fully set forth herein.

26. on or about May 16, 1983, Ronald E. Banks, Substitute Trustee, executed a Notice of Substitute Trustee's Sale to sell the property belonging to LAKE FOREST pursuant to the terms of the Deed of Trust dated May 29, 1979, from LAKE FOREST to John T. Simmons, Trustee for the benefit of GIBRALTAR I, which Deed of Trust is recorded in Volume 528, Page 919, Deed of Trust Records, Denton County, Texas. A copy of such Notice of Substitute Trustee's Sale, including the legal description of the property is attached as Exhibit C to this petition and is made a part hereof for all purposes.

27. On June 7, 1983, a trustee's sale was held at the door of the Denton County Courthouse. Officers from GIBRALTAR I's Fort worth office conducted the sale as Substitute Trustee and as a bidder for the property. Such individuals were acting at the

instance and request of GIBRALTAR I. A representative of LAKE FOREST was present for the foreclosure sale and requested that GIBRALTAR I not conduct the sale, but GIBRALTAR I refused to postpone or cancel the sale. GIBRALTAR I was the only bidder for the property, and was therefore the successful bidder at the foreclosure sale.

28. The Plaintiff would request the Court to set aside the trustee's sale held on June 7, 1983, and covering the real property described in Exhibit B to this petition, and hold the same void for the reason that the Defendant had no justifiable cause for initiating foreclosure proceedings. Any default of the Plaintiff's development loan note is directly attributable to the breach of the loan agreement by GIBRALTAR I. Because GIBRALTAR I lacked authority to initiate the trustee's sale, such sale is void and without force in law and LAKE FOREST should be decreed the owner of such property.

*Count III*

29. The conduct and statements of Defendant GIBRALTAR I more particularly described above in Paragraphs 5 through 27 constitute a breach of covenant of good faith and fair dealing under common law and violate statutory provisions 1.203 and 1.201(19) Texas Business and Commerce Code.

30. Each false, misleading, or deceptive act of Defendant was knowingly committed by Defendant and some one or all of same, independently or concurrently, were the producing cause of Plaintiff's damages.

31. On July 11, 1983, Plaintiff filed a Notice of Lis Pendens with the county clerk of Denton County, Texas, referencing the real

property subject to said trustee's sale. A copy of said Notice of Lis Pendens is attached as Exhibit D to this petition and made a part hereof for all purposes. The Notice of Lis Pendens constitutes constructive notice of this underlying lawsuit to regain title to said property, placing any and all prospective buyers of said property that any interest acquired in said property is subject to the outcome of this lawsuit.

32. Subsequent to July 11, 1983, and continuing until approximately December, 1988, Plaintiff and Defendant GIBRALTAR I conducted pretrial discovery and protracted settlement negotiations.

33. Plaintiff has recently received information indicating that said real property has been purportedly sold to First Gibraltar Bank, FSB (Gibraltar II). Said purported sale of real property was on information and belief executed on or about January 20, 1989.

34. At the time of purchase by Gibraltar II of said real property, prior to, and at all times subsequent, Gibraltar II was on notice that an interest in said real property purchased by Gibraltar II was subject to the outcome of this lawsuit.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays as follows:

1. The Court set aside the sale of 21 certain promissory notes payable to the order of LAKE FOREST DEVELOPMENTS and return title of such notes to the Plaintiff and further that GIBRALTAR I be required to account to LAKE FOREST for any funds received on such notes.

2. The Court set aside the trustee's sale for the real property

owned by LAKE FOREST DEVELOPMENTS and decree that such sale is void and that title to such property remains in the Plaintiff.

3. The Court decree that any and all interest purchased by Defendant Gibraltar II in the real property owned by Lake Forest Developments is void and null, any such interest having been contingent upon the outcome of this lawsuit and purchased by Gibraltar II with actual or constructive notice of said contingency.

4. The Court decree that Defendant Gibraltar I and subsequently Defendant FSLIC did not hold title to the real property owned by Lake Forest Developments and therefore any purported transfer of title to said real property by the Defendants was null and void.

5. The Court order that any amount remaining due pursuant to said loan agreement (if any) be reduced in an amount equal to damages sustained by Plaintiff and caused by Defendant GIBRALTAR I's wrongful and unlawful conduct.

6. The Court award Plaintiff such other relief as Plaintiff may show itself to be justly entitled.

Respectfully submitted,

BROWN, HERMAN, SCOTT, DEAN & MILES

By s/ David Broiles
R. DAVID BROILES (03054500)

203 Fort Worth Club Building
Fort Worth, TX 76102
(817)332-1391 Metro 429-0851

ATTORNEYS FOR PLAINTIFF

*Appendix A*

*CERTIFICATE OF SERVICE*

The undersigned hereby certifies that true and correct copy of the foregoing Plaintiff's Fourth Amended Original Petition has been mailed first class prepaid to Defendant's attorneys of record, Pettit & Martin, 600 N. Pearl Street, Plaza of the Americas, LB 183, Dallas, TX 75201, in accordance with the Federal Rules of Civil Procedure on this ___ day of June, 1989.

R. David Broiles

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION FILED MARCH 26, 1991

CIVIL ACTION NO. CA4-89-094-A

LAKE FOREST DEVELOPMENTS,

Plaintiff,

VS.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR GIBRALTAR SAVINGS ASSOCIATION, ET AL,

Defendant.

*ORDER*

Came on for consideration the motion of defendant Federal Deposit Insurance Corporation as receiver for Gibraltar Savings Association ("FDIC receiver"), for summary judgment. The court, having considered the motion, the summary judgment evidence, and the response of plaintiff, Lake Forest Developments, thereto, finds that the motion is well-taken and should be granted. The court finds that FDIC receiver does not possess any assets from which recovery on a judgment against it can ever be had. *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205 (5th Cir. 1989).

The court ORDERS that FDIC receiver's motion for summary judgment be and is hereby granted and plaintiff's claims against FDIC receiver be and are hereby dismissed. As between plaintiff and FDIC receiver, all costs shall be borne by plaintiff.

*Appendix B*

SIGNED March 26, 1991.

s/ John McBryde
JOHN McBRYDE
United States District Judge